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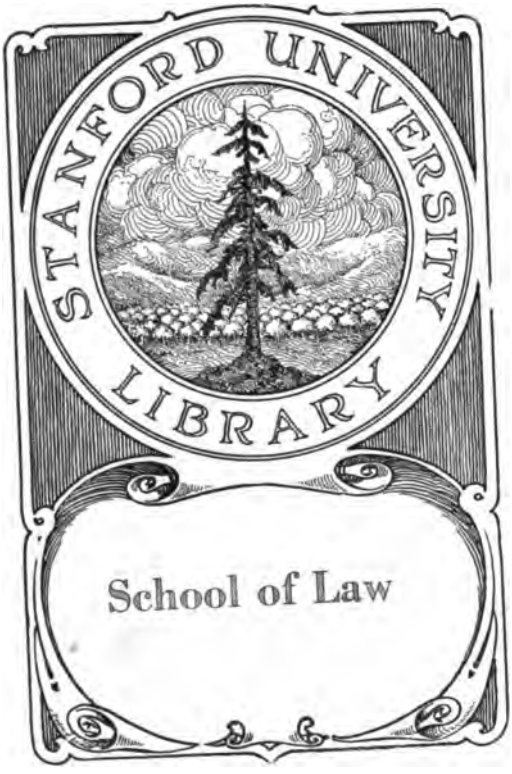

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THE
CANADA LAW JOURNAL

346

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VOL. LIII

1917

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RENEWAL OF WRITS IN NAMES OF DECEASED SUITORS.

It appears to us that the profession will be well advised if they act upon the presumption that the correctness of the decision of the Second Appellate Division of the Supreme Court of Ontario in the recent case of *Mahaffy* v. *Bastedo* is open to grave doubt. The question was whether an execution could be renewed after the death of a sole plaintiff without first obtaining an order to continue the proceedings as provided by Rule 300, or obtaining leave under Rule 566, and whether a sale under a writ renewed without such preliminary proceedings is valid. The Court decided these questions in the affirmative, Meredith, C.J.C.P., dissenting. We venture to question the view expressed by Mr. Justice Riddell as reported in the Weekly Notes (11 O.W.N. 150). If the writ were in the sheriff's hands in full force at the time of the plaintiff's death it undoubtedly might be executed notwithstanding his death and that is all the authorities cited by the learned Judge can possibly establish; but writs of execution have, as is well known, a limited duration, and if not kept renewed they expire. Now the renewal of a writ is a proceeding which must be taken by a suitor in esse who is before the Court, there is no authority cited by the learned Judge which establishes that proceedings can be taken in the name of a deceased person, or that a stranger to an action may intervene therein and take proceedings unless in some way authorized to to so by the Court, in which case he ceases to be a stranger. A man walking along Queen St. has no right to step into Osgoode Hall and take proceedings in any action he pleases, unless he is acting either in person as a litigant in the action, or is the duly authorized agent of some one who is a party. That is a proposition which, but for the decision in question, we should have thought to be so plain and indisputable as not to be even arguable.

If that be so, then it might be asked how can a writ be renewed by a dead man or by a stranger to the action? This is a proposition to which the majority of the Court do not appear to have seen fit to address themselves, as far as the note shows, and yet it is obviously at the very root of the question in issue. Two courses appear to have been open to the representatives of the deceased plaintiff (1) To apply, by analogy to the practice prescribed by Rule 566, for leave to renew the writ. (2) To obtain an order under Rule 300, continue the proceedings and then renew it in the name of the parties added by the order. The plaintiff's representatives adopted neither course, and yet it was held that the procedure was valid. It might be asked on whom would rest the responsibility for a writ renewed in such circumstances? Not on the deceased plaintiff obviously, nor his representatives, because even though they may have authorized the solicitors of the deceased plaintiff to proceed, it could be hardly intended that they authorized them to proceed otherwise than according to the course of the Court, and it may be that the solicitors by whom proceedings are taken in the name of a deceased person would incur a personal responsibility to a defendant whose property should be sold in such circumstances: see *Young* v. *Toynbee*, 1909, 1 K.B. 215. Therefore we say again it is perhaps advisable for the profession not to act upon the case in question, but rather follow the procedure pointed out in the Rules we have referred to, about which there can be no question. In the olden days so insistent was the Court that the suitor should appear in person, or by attorney, before it would proceed to exercise jurisdiction, that we find a defendant in one case actually brought into Court in his cradle, but we have travelled a long way from that, and now according to this lastest decision a person may take proceedings in an action to which he is not a party. The case we may observe appears to be opposed to the decisions in *Re Shephard, Atkins* v. *Shephard*, 43 ch. D. 131; and *Norburn* v. *Norburn*, 1894, 1 Q.B. 448 and *Chambers* v. *Kitchen*, 16 P.R. 219; 17 P.R. 3.

It is said by Riddell, J., that a writ is a judicial act, but though it is true that the writ itself is a judicial act, the issue of the writ

is not so, nor is the application for a renewal of a writ. Writs are not spontaneously issued or renewed by the Court, but only upon the application of the suitor, which because of its routine character is allowed to be made to the officers of the Court instead of to the Court itself. Theoretically they are heard by the Court itself. As Blackstone, J. remarked in *Sparrow* v. *Cooper*, 2 W.B. 1, 1314, the officer of the Court is supposed to be every day in Court sitting at the feet of the Chief Justice and affixing the seal of the Court to all judicial writs which are witnessed at Westminster in the name of the Lord Chief Justice. The suffering him to do this in a private chamber is a mere indulgence convenient to the Court, the suitor, and the officer, and therefore connived at, but the supposition of the law is otherwise; *mutatis mutandis*, this applies to all proceedings authorized to be taken in the offices of the Court.

We can hardly believe that any learned Judge who took part in this decision would knowingly grant an injunction, for instance, for, or against a dead person, and if he would not, how can the renewal, or issue of a writ, for or against a dead person be justified? On applications *ex parte* whether to the Court or its officers it is the duty of the applicant not to conceal any material fact. If the fact that the plaintiff was dead had been disclosed, we hardly think the application for renewal in his name, could, or ought, to have been successful. It is possible that the summary in the Weekly Notes does not accurately convey the language of the learned Judge.

ACTIONS TO ENFORCE MECHANICS' LIENS.

The Second Appellate Division of the same Court in *Barnes* v. *Curley*, 110 W.N. 271, reached the satisfactory conclusion that where an action to enforce a lien is brought, the rights of lien holders who are made parties to the action or served with notice of trial, are not affected by the fact that the plaintiff fails to establish his claim: any other decision would have made it necessary for every lien holder to institute an action on his own behalf in order to protect himself, which might have added enormously to the expense of this kind of action. In order,

however, that the action may be properly prosecuted after the plaintiff's claim has been dismissed, it would seem that an order to continue the proceedings in the name of some one competent to prosecute the action should be first obtained, but with this point the decision above referred to does not deal. We may observe that this decision establishes the correctness of the suggestion in Holmested's Jud. Act, p. 440, that this class of actions is an exception to the ordinary rule governing class actions, viz., that until judgment the plaintiff is *dominus litis*, and that a dismissal of the action or compromise of it before judgment prevents any other member of the class from prosecuting it.

THE LIABILITY OF A LANDLORD IN RESPECT OF A COMMON STAIRCASE.

It is curious to observe the numerous cases, of which *Groves* v. *Western Mansions* (*Times*, 22nd inst.) is the latest example, which are gathering round, but not yet finally deciding, the question of the liability of a landlord for defects in staircases and other parts required for common use of premises which are let out in flats or other separate tenements. Had the courts been content with the reasonable and, it would seem, sufficiently authoritative decision of the Court of Appeal—and a strong Court too, Lord Esher, M.R., and Bowen and Kay, L.JJ.—in *Miller* v. *Hancock* (1893, 2 Q.B. 177), the case would have been simple. There a business visitor to a tenant of offices was injured through the defective condition of the common staircase. The Court held that there was, by necessary implication, an agreement by the landlord with his tenants to keep the staircase in repair, and that from this sprang a duty towards visitors to the tenants to keep it in a reasonably safe condition. In *Huggett* v. *Miers* (1908, 2 K.B. 278) the Court of Appeal refused to extend the principle to the lighting of the staircase; but that is a matter depending on somewhat different considerations, and the case cannot be regarded as in conflict with *Miller* v. *Hancock* (*supra*). In other cases, however, distinctions have been taken which have

had the result of largely nullifying that authority. In *Lucy* v. *Bawden* (1914, 2 K.B. 318), Atkin, J., limited the extent of the landlord's liability by holding that the defendant's knowledge of the defect was an essential element. The landlord was liable, indeed, for defects in the common staircase, but only when he was aware, or should have been aware, of them and the defendant was not—when, that is, the defect was in the nature of a trap. This, of course, deprives the doctrine of much of its utility. Premises have to be used, even though a defect is patent, and a landlord should not be able to escape liability by saying that the person injured was aware of the defect. In other words, the duty of the landlord should be, as in effect was held in *Miller* v. *Hancock* (*supra*), an absolute duty to keep the staricase in repair.

The attack on *Miller* v. *Hancock* was carried further in *Dobson* v. *Horsley* (1915, 1 K.B. 634), where a child of a tenant of a room had been injured through falling from a staircase, one of the rails of which was missing. It appeared that the railing was missing at the time of the letting of the room, and the fact that it was missing was obvious on inspection—at least to adults, if not to three-years-old playing with his toys. Hence Buckley, L.J., pointed out that there was no trap, and accordingly the child and his father, who were suing as co-plaintiffs, had no remedy. Here, as in other cases subsequent to *Miller* v. *Hancock*, it was observed that that was a decision upon the facts of the particular case—a remark which applies just as much, perhaps, to all decisions. It is a maxim of case-law that each decision is concerned only with particular facts, and when it purports to establish a principle wider than the facts require, the excess is liable to be treated as *obiter dictum*. In fact, the idea of *Miller* v. *Hancock* being based on the "trap doctrine" seems to have been invented by subsequent judges who did not care to place the landlord's liability as high as seemed proper to the Court of Appeal in that case, and *Dobson* v. *Horsley* and *Miller* v. *Hancock* must be regarded as being in conflict.

In *Hart* v. *Rogers* (1916, 1 K.B. 646), Scrutton, J., had to choose whether the duty of the landlord was an absolute duty to repair or only a duty not to set a trap. In that case the

question arose out of a defective roof through which water found its way into a flat. It is curious that *Dobson* v. *Horsley* (*supra*) does not seem to have been referred to, but the learned judge took a decided view as to the extent of the principle established in *Miller* v. *Hancock*, and he followed it in preference to the limitations imposed by later cases. "I have," he said, "carefully considered the language of *Miller* v. *Hancock*, and have come to the conclusion that, as reported, all the judges imposed an absolute duty to repair on the landlord. I think if the Court, and particularly Bowen, L.J., had meant merely to impose a liability for traps on the lines of *Indermaur* v. *Dames* (L.R. 2 C.P. 311), they were quite capable of expressing it in clear words, and would have done so."

But in the present case of *Groves* v. *Western Mansions* (*supra*) the Divisional Court (Lush and Bailhache, JJ.) had *Dobson* v. *Horsley* (*supra*) before them, and they held—though Bailhache, J., with hesitation—that the trap theory now holds the field. It may be so, but we have on numerous occasions expressed the view that *Miller* v. *Hancock* is the better authority, and, since leave to appeal has been given, we hope the matter may now be reconsidered, and the wide principle which the Court of Appeal first laid down confirmed.—*Solicitors' Journal.*

TERMINOLOGY OF COMPOUND NAMES.

A correspondent in a note published in our last volume (page 430) took exception to the expression "Lords Justices," which was used in 36 O.L.R. p. 205, thinking that grammar requires the expression "Lord Justices." Another correspondent now writes us taking strong ground against this criticism. He says that when the Court of Appeal in Chancery matters was instituted by 13 & 14 Vict. c. 83, it was expressly provided in sec. 3 that the Judges to be appointed should be called "Lords Justices," and they always were so called. Also that when the Judicature Act was passed in 1873 (36 & 37 Vict. c. 66), sec. 6 provided that the

"Judges of the Court of Appeal shall be styled Lords Justices of Appeal;" and our correspondent remarks, "no one with any sense of propriety would say anything else." It may be noted also that in M. & G. Reports the words "Lords Justices" are used as also the expression "Lords Chancellors." In the Law Reports the "Lords Justices" are named; and universally, apparently, this terminology is employed by English Judges. Murray's new English Dictionary moreover uses the same expression. Again it may be remarked that when the great seal was in commission it was handed to "Lords Commissioners." It appears therefore that the expression in 36 O.L.R. is amply justified by usage. But neither usage nor statute can alter grammar. Is it not correct to say as a general rule in reference to making a plural of compound words that one of them only should be pluralized, and not both, one of them being treated as an adjective? And if so it would be proper to say either "Lords Justice" or "Lord Justices," but not to put both words in the plural. We always say "Chief Justices" and not "Chiefs Justices" "Attorney-Generals" but not "Attorneys-Generals." So also "Masters of the Rolls" and "Barristers at law." Whether the expression "Lords Justices" ought to be regarded as an exception to, or a violation of, the general rule, we leave to the judgment of our readers.

The following words taken from a letter of one of the best of our profession in answer to words of sympathy on the death of his son at the front, is a brave and appropriate utterance :—

"When so many thousands of fathers are mourning the loss of their dear sons I cannot allow myself to feel this loss too selfishly. The men to be pitied are those who have sons who are unwilling to do their bit for king and country; for liberty and honor, at this period of our need."

REVIEW OF CURRENT ENGLISH CASES.

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SALE OF GOODS—CONTRACT—"SUBJECT TO SAFE ARRIVAL"—SHIP NOT NAMED.

Barnett v. *Javeri* (1916) 2 K.B. 390. This was an action on a contract made between the parties whereby the defendants agreed to sell to the plaintiff goods "subject to safe arrival." The defendants had made a contract with another person for delivery to themselves of the goods in question which were expected to arrive from Alexandra. No ship was named in the contract between the plaintiff and defendants by which the goods were to arrive. The defendants' vendor was unable to obtain the goods or to supply them to the defendants, who, in consequence, was unable to deliver them to the plaintiff. The defendants claimed to be free from liability by reason of the words "subject to safe arrival," but Bailhache, J., who tried the action, held that those words, in the circumstances, afforded no defence, because there was an obligation on the defendants' part to ship the goods, or to get them so far under their control that they were placed on board some ship, and not having done so, they were not protected by the words relied on, which the learned Judge held merely meant that, provided the defendants shipped the goods, they were not to be liable for non-delivery consequent on any accident in their transit preventing their safe arrival. He therefore held the defendants were liable for breach of contract as claimed.

SUNDAY OBSERVANCE—SALE OF ICE CREAM ON SUNDAY—ICE CREAM IS NOT MEAT—SUNDAY OBSERVANCE ACT (29 CAR. 2, C. 7). SS. 1, 3.

Slater v. *Evans* (1916) 2 K.B. 403. In this case a Divisional Court (Darling, Avory and Horridge, JJ.) have decided that ice cream is not "meat" within sec. 3 of the Sunday Observance Act (29 Car 2 c. 7) s. 3, and therefore that its sale by a restaurant-keeper on Sunday was a breach of the Act, and that both the vendor and vendee were liable to conviction, the latter on the ground that he had aided and abetted the vendor to commit an offence against the Act.

CONTRACT—LIGHTING OF STREETS—SUPPLY OF GAS AND LAMPS —INCLUSIVE FLAT RATE—GOVERNMENT ORDER RESTRAINING LIGHTING—CONTRACT IMPOSSIBLE OF PERFORMANCE—CONDITION PRECEDENT—DEFENCE OF REALM REGULATIONS.

Leiston Gas Co. v. *Leiston-cum-Sizewell* (1916) 2 K.B. 428. This is a case arising in consequence of the war. The plaintiffs were a gas company and had contracted with the defendants, a municipal authority, to supply all necessary lamps and gas for the lighting of the defendant's district. The lamps were supplied and the plaintiffs were ready and willing to furnish the necessary gas, but owing to a regulation issued by the Government the defendants were prohibited from lighting the street lamps. The plaintiffs nevertheless claimed to recover the quarterly payments due under the contract. Low, J., who tried the action, decided in favour of the plaintiffs (1916) 1 K.B. 912 (see ante vol. 52, p. 255), and the Court of Appeal (Lord Reading, C.J., Warrington, L.J., and Scrutton, J.) have now affirmed his decision, and have held that, as the rate of payment was a flat rate both for furnishing the lamps and supplying the gas, there could be no apportionment because it could not be determined how much of the contract price was attributable to the lamps, or how much to the gas to be furnished, and, moreover, that the furnishing of the gas was not a condition precedent to the plaintiff's right to recover.

CRIMINAL LAW—SENTENCE—EVIDENCE AS TO MOTIVE—AGGRAVATING CIRCUMSTANCES.

The King v. *Bright* (1916) 2 K.B. 441. The prisoner in this case was indicted for contravention of No. 18 of the Regulations made by Order-in-Council under the Defence of the Realm Act (5 Geo. V., c. 8) for having, without lawful authority, collected or attempted to collect information as to the manufacture of war material. It was not charged that he had done so for the purpose of assisting the enemy. The prisoner pleaded guilty, and Avory, J., who tried the case, heard evidence, and came to the conclusion therefrom that the accused had committed the act charged, and to which he pleaded guilty, for the purpose of assisting the enemy, and sentenced him to penal servitude for life. The Court of Criminal Appeal (Darling, Bray and Horridge, JJ.) reduced the sentence to ten years, being of the opinion that, although it was competent for the Judge who tried the person to inquire into the

motive of the prisoner, yet he could not properly as the result of such inquiry inflict a heavier sentence on the ground that it thereby appeared that the accused had committed a more serious offence than that for which he was indicted, and to which he had pleaded guilty.

ALIEN—SON BORN ABROAD OF NATURALIZED PARENT—RESIDENCE OF INFANT SON WITH WIDOWED MOTHER IN ENGLAND—NO GRANT OF CERTIFICATE OF NATURALIZATION TO MOTHER—NATURALIZATION ACT 1870 (33 VICT., C. 14) S. 10.

Jaffé v. *Keel* (1916) 2 K.B. 476. This was a case stated by Justices. Jaffé was charged with not having registered, being an alien enemy. The facts being that his father, who was a German, became naturalized under the Aliens Act 1844; he was married at that time to a German woman. In 1856 the father was sent from England to Germany as a missionary to Jews, and died in Germany in 1887. His widow in 1875 returned to England with the appellant, who was born in Germany, and had remained in England ever since and claimed to be a British subject. A Divisional Court (Darling, Avory & Horridge, JJ.) held that even assuming the appellant's father had, by his naturalization in 1844, become entitled to the privileges of the Naturalization Act of 1870, the appellant did not obtain the status of a British subject under s. 10, sub. s. 5 of the Act of 1870, which provides that "where the father or the mother being a widow has obtained a certificate of naturalization in the United Kingdom every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom shall be deemed to be a naturalized British subject," because his mother, although entitled to the privileges of a British subject by virtue of her husband's naturalization, did not herself obtain a certificate of naturalization in the United Kingdom.

INSURANCE, LIFE—POLICY ON LIFE OF ANOTHER—ABSENCE OF INSURABLE INTEREST—CONTRACT INDUCED BY FRAUD—RECOVERY OF PREMIUMS PAID—LIFE INSURANCE ACT 1774 (14 Geo. III. c. 48) s 1—(R.S.O. c. 183 s. 169).

Hughes v. *Liverpool Victoria Legal Friendly Society* (1916) 2 K.B. 482. This was an action to recover premiums paid on a void policy in the following circumstances. In 1908 and 1909 one Thomas effected with the defendants five policies of insurance

on the lives of others in one of whom he had an insurable interest, but as to the others it was doubtful. After a short time Thomas decided not to keep up the policies and stopped paying the premiums and burnt the policies. In 1910 Evans, an agent of the defendant society, persuaded the plaintiff to assume and keep up the policies of which he procured duplicates to be issued, and on Lloyd, another agent of the defendants, assuring her that if she paid the arrears and the future premiums it would be all right, she paid the arrears, and received the five duplicate policies. Thomas did not assign the policies nor ask for duplicates. The plaintiff had no insurable interest in any of the lives insured, and having discovered that the policies were illegal and void, brought the action to recover the premiums paid by her. The defendants contended that the parties were in *pari delicto* and, therefore, that the plaintiff could not succeed, because the defendants were by statute prohibited from issuing policies to insurers having no insurable interest. Scrutton, J., gave effect to their contention, but the Court of Appeal (Eady, Phillimore and Bankes, L.JJ.) held that the plaintiff having been induced to assume the policies and pay the premiums on the false and fraudulent representation of the defendants' agents that it would be all right to do so, she was not in *pari delicto* with the defendants, but entitled to recover what she had paid.

CINEMATOGRAPH—LICENSE—CONDITIONS OF LICENCE—REASONABLE CONDITIONS—VALIDITY OF LICENCE—(R.S.O. c. 236 s. 3).

Stott v. *Gamble* (1916) 2 K.B. 504. This was an action brought by the plaintiffs, dealers in cinematograph films, against justices of the peace to have it declared that certain conditions imposed by them in a licence granted for the exhibition of cinematograph films, were unreasonable and void, and an undue interference with the contractual rights of the plaintiffs The plaintiffs were proprietors of a film known as "Five Nights," and entered into a contract to let to the Hippodrome Company a copy of their film to be exhibited during the week ending October 9th, 1915, at their theatre. On the 4th October, 1915, the defendants attended at the Hippodrome and viewed the film, and prohibited its exhibition. This they did under the provisions contained in the licence to the Hippodrome, whereby it was provided: "That no film shall be shown that is objectionable or indecent, or anything likely, or tending, to educate the young in the wrong direction, or likely to produce riot, tumult, or breach of the peace,

and no offensive representations of living persons shall be shown." Provided also "That no film shall be exhibited if notice that the justices (*i. e.* the licensing authority) object to such film has been given to the licensee."

In consequence of the notice, the Hippodrome gave notice to the plaintiffs that the film in question could not be, and it was not exhibited. Horridge, J., who tried the action, held that the meaning of the condition was that the licensing authority might give notice of objection to any film where they had *bonâ fide*, in the judicial exercise of their discretion, come to the conclusion that the film was objectionable on some one or more of the grounds mentioned therein, and that, so interpreted, the condition was reasonable and valid. And that even if the condition were unreasonable, the plaintiffs had no cause of action because there was no evidence that the defendants had knowingly, or for their own ends, induced the Hippodrome to commit any actionable wrong. The action therefore failed, and was dismissed with costs as between solicitor and client.

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—PART PERFORMANCE—SUPERVENING ILLEGALITY—QUANTUM MERUIT.

St. Enoch Shipping Co. v. *Phosphate Mining Co.* (1916) 2 K.B. 624. This strikes us as a somewhat hard case, which, though it may be law, does not appear to be justice. The facts were that the owners of a British ship agreed to carry goods from Florida to Hamburg. On August 3, 1914, the ship sighted the Lizard and was warned by the British Admiralty to take the goods to an English port. On the following day war was declared between Great Britain and Germany and the further prosecution of the voyage to Hamburg became illegal and impossible. The cargo was thereupon discharged at Runcorn and deposited with warehousemen, subject to a lien claimed by the shipowners for freight. The owners of the cargo discharged the lien under protest and took the goods, never having assented to any alteration in the terms of the contract of carriage. The action was brought by the shipowners claiming a declaration that they were entitled to the freight in whole, or at all events for a proportionate part thereof, in respect of the part of the voyage actually completed. Rowlatt, J., however, who tried the action, held that the plaintiffs were entitled neither to the whole freight, nor to any proportionate part thereof by way of *quantum meruit*, and the action was therefore dismissed.

INSURANCE, LIFE — DEATH "DIRECTLY OR INDIRECTLY" CAUSED BY WAR—DEATH OF ASSURED BY ACCIDENT WHILE ENGAGED IN MILITARY DUTIES.

Coxe v. *Employers' Liability Assurance Co.* (1916) 2 K.B. 629. In this case the construction of a policy of life insurance was in question whereby the assured was insured against death except it be "directly or indirectly" caused by war. The insured was a military officer, and, in the discharge of his military duties, was accidentally killed by a train whilst walking alongside the rails of a railway for the purpose of visiting sentries posted along the line. An arbitrator to whom the claim was referred found as a fact that the death of the insured occurred while in the discharge of his military duty, and was within the exception, and this conclusion was affirmed by Scrutton, J., on a case stated by the arbitrator.

HUSBAND AND WIFE—ACTION BY WIFE AGAINST HUSBAND—TORT—ACTION FOR RESCISSION OF DOCUMENT FOR FRAUD—MARRIED WOMAN'S PROPERTY ACT, 1882 (45-46 VICT. C. 75) S. 12—(R.S.O. c. 149 s. 16).

Hulton v. *Hulton* (1916) 2 K.B. 642. This was an action by a wife against her husband to recover damages for deceit, alleging that by his fraudulent representations she was induced to execute a separation deed. The plaintiff also claimed to have the deed rescinded and declared void. As to the claim for damages Lush, J., held that the action was for tort, and could not be maintained; See the Married Women's Property Act, s. 12 (R.S.O. c. 149, s. 16) and could not be supported as an action for the protection of her separate property. But as to the second branch for rescission, although it was based on an alleged wrongful act of the husband, it was not an action for tort within the meaning of the section above referred to, and was maintainable, and judgment was given in favour of the plaintiff on that part of her case.

CRIMINAL LAW—EVIDENCE OF ACCOMPLICE—CORROBORATION.

The King v. *Baskerville* (1916) 2 K.B. 658. This was an appeal to the Court of Criminal Appeal from a conviction, on the ground that the evidence of an accomplice had not been sufficiently corroborated. The appellant was found guilty of

the commission of a criminal offence with two boys, who were called as witnesses and were accomplices in the crime. The only corroborative evidence offered was a letter in the prisoner's handwriting addressed to one of the boys arranging for a meeting with the two boys and enclosing money. The prisoner admitted the letter, and that the boys had come to his flat by his invitation, and alleged that they did so in order to confer with him about getting them employment. The Judge warned the jury not to convict unless in their opinion the evidence of the boys was corroborated in some material particular affecting the accused, but told them that they would be entitled to regard the above mentioned letter as sufficient corroboration. The jury found the prisoner guilty; and the Court (Lord Reading, C.J., Scrutton, Avory, Rowlatt and Atkin, JJ.) affirmed the conviction.

WILL OF SOLDIER—WILL OF NURSE ON LEAVE AFTER RECEIVING ORDERS TO REJOIN ARMY—WILLS ACT 1837 (1 VICT. C. 26) S. 11—(R.S.O. C. 120 S. 14).

In re Stanley, 1916, P. 192. An army hospital nurse while on leave, but after she had received orders to return to duty, wrote a letter giving the addressee full liberty to deal with her affairs, and giving directions as to the disposal of her property. The letter was unattested and the question was whether or not it was a valid soldier's will under the Wills Act 1837. (1 Vict. c. 26) s. 11 (R.S O. c. 120 s. 14). Deane, J., decided that it was, and that the addressee was executrix according to the tenor, and entit ed to probate.

PRIZE COURT—ENEMY PLEDGOR OF CARGO—DEFAULT IN RESPECT OF ADVANCES—SALE BY PLEDGEE—LOSS OF RIGHT TO REDEEM —RELEASE TO PURCHASER.

The Ningchow (1916) P. 221. This was an application on behalf of the Crown to condemn a cargo which had been seized as prize. It appeared that the cargo was owned by Germans who had pledged it to a Japaneese bank for advances. Default having been made in payment, the bank has sold the cargo to British subjects, and the purchasers claimed that the cargo should be released to them. Evans, P.P.D., held that the right of the pledgors to redeem had been lost by the sale, and they had ceased to be owners, and he ordered the cargo to be released to the purchasers, as claimed.

PRIZE COURT—ENEMY (GERMAN) SHIP—ENEMY (AUSTRIAN) CARGO—CARGO SEIZED BEFORE DECLARATION OF WAR—CONTINUOUS SEIZURE—HAGUE CONVENTION NO. VI. ARTS. 3, 4.

The Schlesein (1916) P. 225. In this case a German ship had been seized after war, and taken with her cargo, owned by Austrian subjects, to Plymouth. A writ was issued against the cargo some hours before war was declared with Austria, and a second writ was subsequently issued after war was declared with that country, which remained in the custody of the officer of the Court, until by consent it was sold by the officer, and the proceeds paid into Court. On an application by the Crown claiming the proceeds as prize, Evans, P.P.D., held that although the cargo might have been claimed in the interval between the seizure of the vessel and the declaration of the war with Austria, yet as that claim was not made, and the hand of the Crown remained on the goods, they became the subject of prize as soon as war was declared, and the proceeds therefore belonged to the Crown and that the goods were not protected under the Hague No. Convention VI. arts. 3 and 4.

PRIZE COURT—CARGO—INSURANCE AGAINST WAR RISKS—NEUTRAL PROPERTY AT DATE OF SEIZURE—PROPERTY IN ENEMY UNDERWRITERS AT DATE OF CLAIM.

The Palm Branch (1916) P. 230. This is another prize case. The facts being, that the goods in question were insured against war risks by enemy underwriters. At the time of seizure the property in the goods was in the shippers, who were neutrals. After the seizure the shippers' German agents claimed against the underwriters for a total loss. The underwriters paid in full and thereupon became owners of the goods, and the claim filed by the shippers in the Prize Court proceedings was, in fact, made by them on behalf of the underwriters. Evans, P.P.D., held that in these circumstances the enemy underwriters were really the beneficial claimants and that therefore the claim must be disallowed.

COMPANY—WINDING-UP—MANAGING DIRECTOR—SALARY AND COMMISSION—LOSS OF SALARY—LOSS OF PROSPECTIVE COMMISSION—LOSS OF OPTION TO TAKE SHARES—IMPLIED CONDITION AS TO EXERCISE OF OPTION.

In re Newman, Raphael's claim (1916), 2 Ch. 309. This was a winding-up proceeding in which the extent and amount of a

claim against the company was in question. The claimant was appointed managing director for one year from July 1, 1915, at a salary of £5 per week and a commission of £5 per cent. on all sales of the company's goods. By the agreement the claimant was, on applying to the company, entitled to an option to purchase one-third of the share capital of the company, and, when he acquired such shares, it was provided that his commission should cease but his employment should continue for ten years from July 1, 1915, at £5 per week. He was not to part with the shares without the written consent of the directors On November 16, 1915, a compulsory winding-up order was made before the claimant had exercised his option. On December 3, 1915, he was employed by one of the directors, who carried on a similar business to that of the company, at £5 a week without commission and subject to a week's notice. In January, 1916, he sent in proof as a creditor of the company, claiming—

(a) Arrears of salary and commission up to the winding-up.

(b) Damages for loss of salary from the winding-up to 30 June, 1916.

(c) Damages for loss of commission during the same period.

(d) Damages for loss of option to take up shares, and of right to ten years' appointment.

The liquidator allowed the claim (a) and (b) up to the date the claimant obtained his new appointment, but rejected the rest of the claim.

On the hearing the claimant admitted that his present appointment, though precarious, would probably continue up to 30 June, 1916 but contended that damages ought to be assessed as at the date of the breach of contract, having regard to the probability of his obtaining full employment for the term. Astbury, J., held that in the circumstances, the claimant had not proved any damages under head (b) beyond what the liquidator had allowed. He also held that the claim of loss of commission under head (c) and for loss of option under (d) were not maintainable, and that as to (d) there was an implied condition that the option should be exercised while the company was in active existence, and this condition precedent not having been complied with, the claimant had no ground of claim under that head. The Court of Appeal (Lord Cozens-Hardy, M.R., Pickford and Warrington, L.JJ.) agreed with Astbury, J., in disallowing the claims under head (c), and the other grounds of claim do not appear to have been considered in appeal.

Correspondence.

APPEALS IN CERTIORARI MATTERS.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR:—Several points of interest to the profession arose in connection with the endeavour to quash a conviction in *Rex* v. *Sinclair*, 7 O.W.N. 131.

Sinclair was convicted before the Police Magistrate for Toronto of stealing $5.00 from the Grand Trunk Railway Company, for whom he was working as a conductor. The evidence for the Crown showed that $5.00 had been quietly "slipped" to Sinclair to induce him not to collect the regular fare for three persons, the fare being $8.25. A motion to quash the conviction (made under Rule 1279) was refused by Mr. Justice Clute (36 O.L.R. 510). Leave to appeal to the Court of Appeal from Mr. Justice Clute's decision was given by Mr. Justice Kelly, under Rule 1287.

Upon the appeal coming on to be heard before the Court of Appeal, counsel for the accused was called upon to shew by what right an appeal could be taken to that Court from the decision of Mr. Justice Clute, the Court intimating its opinion that no such appeal lay. The following memorandum was thereupon submitted to the Court:

"Sec. 576 of the Criminal Code gives power to the Court to make rules

> (3) For regulating in criminal matters the pleading, practice and procedure of the Court, including the subjects of . . . certiorari. . . ."

By virtue of such authority Rules 1279 to 1288 were passed on 27th March, 1908. (See Holmested, p. 143.)

Rule 1279 provides "In all cases in which it is desired to move to quash a conviction . . . the proceeding shall be by notice of motion," etc.

Rule 1284 makes the motion returnable before a Judge in Chambers; and

Rule 1287 says: "An appeal shall lie from the order of the Judge to a Divisional Court" (now the Court of Appeal) "if leave be granted by a Judge of the High Court."

That leave was granted by Hon. Mr. Justice Kelly.

The above rules are st ll in force and applicable to criminal proceedings in the Supreme Court of Ontario as at present constituted:

Rex v. *Titchmarsh*, 24 Can. Cr. Cas. 38, 22 D.L.R. 272, 6 O.W.N. 317.

The provision allowing an appeal is a matter of practice and procedure:

Rex v. *Thornton*, 26 Can. Cr. Cas, 120. The Alberta Rule is:—

"20. When the motion (*i.e.* for . . . certiorari) is made to a Judge, an appeal shall lie to the Appellate Division but subject to such right of appeal his decision shall be final.

Beck, J., there says (26 Can. Cr. Cas. at page 137):—

"To me the principle is clear. It is that a single Judge is the delegate, committee, representative or mouthpiece of the Court and that being so, his decision is always open to review and revision by the Court . . . The Rule in question is merely one of procedure to obtain such a review or revision. Such power is inherent in this Court as having all the jurisdiction of the former English Superior Courts of common law and equity."

The law is exhaustively reviewed by the whole Court, and the conclusion reached that the right of appeal is a matter of practice and not of substantive law, as it would be if an appeal were given to another Court altogether—say to the Supreme Court of Canada. Accordingly the Rule was upheld.

Ontario Rule 1287 is, therefore, sufficient authority for the appeal in the *Sinclair* case"

The judgment of the Court (Sir Wm. Meredith, C.J.O., Maclaren, J.A., Magee, J.A., Hodgins, J.A., Riddel, J.) was delivered (11 O W.N. 131) by the learned Chief Justice, who said that: "The motion before Clute, J., and the appeal were misconceived as the summary convictions provisions of the Code do not apply to a prosecution under subsection 777 (5). It is only where the trial has taken place before two magistrates that an appeal lies in the same manner as from a summary conviction under Part XV. (s. 797). The only appeal which lies in a case such as this is that given by section 1013 of the Code, which provides that an appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases, or of a magistrate proceeding under section 777, on the trial of any person for an indictable offence, shall lie, upon the application of such person, if convicted, to the Court of Appeal, in the cases thereinafter provided for, and in no others. The appeal must therefore be quashed.

The same conclusion was reached in *Reg.* v. *Racine*, 3 Can. Cr. Cas. 446 (1900) Que. R. 9 Q.B. 134"

It is respectfully submitted that the Court entirely misapprehended the point before it. The appeal was not an appeal from a conviction, but an appeal in a *certiorari* proceeding, from a decision of Mr. Justice Clute refusing to quash a conviction. The case of *Reg.* v. *Racine* was one where an appeal was sought to be taken from a conviction and was not a motion to quash by way of *certiorari*.

It is also submitted that the right to move to quash a conviction still exists, and that, under the rules above referred to, an appeal may be had, on leave, to the Court of Appeal.

The merits of *Sinclair's* case were, of course, not determined by the Court.

Could a conviction for theft, under the circumstances, be upheld? The $5 received was evidently a bribe offered to Sinclair not to do his duty, which was, to collect $8.25 cash fares from the three passengers. The property in the $5 never was in the company; it was not received for them or on their behalf; in fact, the intention in paying it was, not that the company should receive it, but that the conductor, Sinclair, should retain it for his breach of duty.

The point came up squarely for decision in Alberta in the case of *Rex* v. *Thomson*, 21 Can. Cr. Cas. 80 (1911), and the decision was that the receipt and retention of the money did not constitute theft.

J. G. O'DONOGHUE.

TORONTO, Dec. 13, 1916.

[We shall refer to this at length in our next issue.—ED. C.L.J.]

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Ont.] [Dec. 11, 1916.

GLEN FALLS INSURANCE CO. v. ADAMS.

Appeal—Amount in Controversy—Joinder of Defendants—Separate Contracts.

A., by order of a master, was allowed to bring action against three insurance companies on three separate policies and obtained from the Appellate Division judgment against each for an amount less than $1,000 though the amounts in the aggregate exceeded that sum.

Held, following *Bennett* v. *Havelock Electric Light Co.* (46 S.C.R. 640), that the defendants were in the same position as if a separate action had been brought against each and, as none of them was made liable for a sum exceeding $1,000, no appeal would lie to the Supreme Court of Canada.

Appeal quashed with costs.

W. L. Scott, for motion to quash. *Leighton McCarthy*, K.C., contra.

Ont.] Dec. 11, 1916.

SHARKEY v. YORKSHIRE INSURANCE CO.

Insurance—Stallion—Conditions—Attachment of risk.

S. applied for insurance on a stallion "for the season," the application stating "term 3 mos." and that the insurers would not be liable until the premium was paid and the policy delivered. The policy eventually issued stated that the insurance would expire at noon on 7th September, and insured against the death of the stallion, after premium paid and policy delivered, from accident or disease "occurring or contracted after the commencement of the company's liability." The policy was delivered and premium paid before four o'clock p.m. of the 8th of June; the horse had become sick early that morning and died before six o'clock p.m.

Held, affirming the judgment of the Appellate Division (37 Ont. L.R. 344), that the statement in the application "date of expiry 7th Sept." did not override the express provision as to commencement of liability and make the risk attach from noon of 7th June; that there was no liability until the policy was delivered on the 8th of June; and, as the horse died of an illness contracted before such delivery, S. could not recover.

Appeal dismissed with costs.

Sir George C. Gibbons, K.C., for appellant. *G. F. Macdonnell*, for defendants.

B. C.] [Oct. 18, 1916.

TAIT v. BRITISH COLUMBIA ELECTRIC RY. CO.

Appeal—Jurisdiction—Action in County Court—Concurrent jurisdiction with Superior Court—Construction of statute—Supreme Court Act — B.C. Court of Appeal Act — B.C. "County Courts Act"—New trial—Re-hearing.

An action in the County Court in British Columbia to recover $578, damages for injuries sustained, alleged to have been caused through negligence, was dismissed by the County Court Judge after the evidence for the plaintiff had been put in, the defendants offering no evidence. The plaintiff appealed to have judgment entered in his favour or, alternatively, to have the case remitted to the County Court to have damages assessed, or for such further order as might be deemed proper by the Court of Appeal. The appeal was dismissed and the judgment appealed from affirmed. The British Columbia Court of Appeal Act, R.S.B.C., ch. 51, s. 15, s-s. 3, provides that every appeal shall include a motion for a new trial unless otherwise stated in the notice of appeal. On motion to quash an appeal to the Supreme Court of Canada on the grounds that the notice prescribed by sec. 70 of the Supreme Court Act had not been given within 20 days from the date of the judgment appealed from and that the action was not of the class in which a County Court had concurrent jurisdiction with a superior Court, under sec. 37*b* of the Supreme Court Act limiting appeals to the Supreme Court of Canada.

Held, Duff, J., dissenting, that no appeal could lie to the Supreme Court of Canada.

Per Fitzpatrick, C.J.:—As the case was not one in which a County Court is given concurrent jurisdiction with a superior Court, under section 40 of the County Courts Act, R.S.B.C. 1911, ch. 53, the Supreme Court of Canada had no jurisdiction

to entertain the appeal. *Champion* v. *World Building Co.* (50 Can. S.C.R. 382) referred to.

Idington, J., adhered to the opinion expressed by him in the case of *Champion* v. *World Building Co.*, 50 S.C.R. 382.

Per Anglin, J.:—In the circumstances of the case the judgment of the Court of Appeal should be regarded as a judgment upon a motion for a new trial within the meaning of sec. 70 of the Supreme Court Act, R.S C. 1906, ch. 139, and, notice not having been given as thereby provided, there could be no appeal to the Supreme Court of Canada. *Sedgwick* v. *Montreal Light, Heat and Power Co.*, 41 S.C.R. 639, and *Jones* v. *Toronto and York Radial Ry. Co.*, S C. Pr. 432, referred to. *Champion* v. *World Building Co.*, 50 S.C.R. 382, adhered to.

Per Duff, J., dissenting:—The judgment from which the appeal is asserted was not a judgment upon a motion for a new trial but a decision on the merits of the case upon an appeal by way of re-hearing by the Court of Appeal for B.C. which had before it all the evidence necessary for that purpose. Consequently, section 70 of the Supreme Court Act had no application to the appeal to the Supreme Court of Canada. Further, the County Court derived its jurisdiction from section 30, s-s. 1, of the County Courts Act, R.S.B.C. 1911, ch. 53, and its powers to exercise that jurisdiction under sec. 22 of that Act; consequently, the County Court possessed 'concurrent jurisdiction" with the Supreme Court within the meaning of sec 37*b* of the Supreme Court Act R.S.C. 1906, ch. 139, notwithstanding that the word "concurrent" is not employed in either of those sections of the County Courts Act.

Appeal quashed with costs.

Tilley, K.C., for the motion to quash. *R. M. Macdonald*, contra.

Province of Ontario

SUPREME COURT.

Middleton, J.] ANSELL v. BRADLEY. [13 D.L.R. 207.

Mortgage—Notice of sale—Signature of mortgagee.

The absence of a mortgagee's signature to a written notice of sale served upon the mortgagor under the power of sale con-

tained in the mortgage is fatal to the validity of any sale thereunder.

S. H. Bradford, K.C., for plaintiff.
T. P. Galt, K.C., for defendant Bradley.
G. H. Watson, K.C., for defendant Echkardt.

ANNOTATION ON THE ABOVE CASE FROM D.L.R.

Clause 14, of the Statutory form of Mortgages (R.S.O. 1914, ch. 117) conferring the power of sale and providing for application of moneys is one which varies much from the modern approved forms. It conflicts apparently as regards right to possession with clauses 7 and 17. It does not extend to breach of covenants as do those clauses. The power is given to the personal, as well as the real, representatives, although by the Devolution of Estates Act, R.S.O. c. 119, s. 7, it is enacted that in the interpretation of any Act, or any instrument to which a deceased person was a party, his personal representatives, while the estate remains in them, shall be deemed his heirs, unless a contrary intention appears. And though the administrator might sell under the power while the estate is vested in him, yet if it should shift into the heirs, the administrator might still sell. It should not, however, be dependent on notice, but the provision as to notice should be by a covenant by the mortgagee that notice shall be given; and the purchaser should be expressly relieved from any necessity as to seeing that notice was given. There is no power to the mortgagee to buy in an auction and re-sell without being responsible for loss or deficiency on re-sale; or to rescind or vary any contract of sale that may have been entered into; or to sell under special conditions of sale (though the latter may be permissible when the conditions are not of a depreciatory character). The application of insurance moneys is provided for. The surplus of sale moneys is to be held in trust to pay to the mortgagor. There is no clause relieving a purchaser from seeing that default was made, or notice given, or otherwise as to the validity of the sale; the importance and benefit of which to the mortgagee, and even to the mortgagor, will be presently alluded to. The provision that the giving of the power of sale shall not prejudice the right to foreclose is unnecessary, as it is an independent contractual right.

For the transfer of the legal estate of the mortgagee at law no power of sale is requisite, and the assignee or vendee will take subject to such rights as may be subsisting in the mortgagor, or those who claim under him, of possession, redemption, or otherwise; in other words, the mortgagee may always assign the mortgage debt and convey the land; and thus a sale and conveyance of the estate by the mortgagee to a vendee, though made professedly as in exercise of a power of sale in the mortgage, is valid to pass the legal estate of the mortgagee, even though no power of sale existed, or were improperly exercised, and when the mortgagor's right to possession is gone, the vendee can maintain ejectment; he occupies, in fact, the position of assignee of the mortgage, see *Nesbitt* v. *Rice*, 14 C.P. 409. The chief object of the power is to enable the mortgagee or other party claiming through him to sell

and convey the land free from the right of redemption of the mortgagor, and of all claiming through him subsequent to the mortgage, whether by express charge or by execution, or otherwise, and thus avoid the time and expense of proceedings required to foreclose or sell under the order of the Court.

The power of sale is now commonly resorted to, and although at first sight its insertion may appear prejudicial to the interests of the mortgagor, yet in truth it is not so, if it is only to be exercised on reasonable notice after default and the sale take place at public auction. The absence of such a power may be very prejudicial to the interests of both mortgagor and mortgagee, where the equity of redemption becomes incumbered by executions or otherwise, as on a suit of foreclosure or sale the incumbrancers have to be made parties, sometimes at great expense. As regards any objections on the ground of possibility of improper exercise of the power by an individual, which could not happen on sale under direction of the Court, a Court of equity will closely scrutinize the mortgagee's conduct, and, if improper, afford relief.

The word "assigns," as referable to the mortgagee, should never be omitted, for in its absence it has been said that an assignee of the mortgage could not exercise the power of sale, Davidson Conv., 3 ed., vol. 2, 621; *Bradford* v. *Belfield*, 2 Sim. 264, and it may be doubtful whether a devisee could, *Cooke* v. *Crawford*, 13 Sim. 91; *Wilson* v. *Bennett*, 5 DeG. & Sm. 475; *Stevens* v. *Austen*, 7 Jur. N.S. 873; *Macdonald* v. *Walker*, 14 Beav. 556; see also *Ridout* v. *Howland*, 10 Gr. 547.

The power in the statutory form is made conditional on notice being given. It is preferable that notice should be provided for by a separate covenant by the mortgagee not to sell till after the specified notice, *Forster* v. *Hoggard*, 15 Q.B. 155. But where the statutory form is used the mortgagee cannot sell without notice. As it has been held that the statutory form cannot be modified by changing the provision for notice to one without notice, *Re Gilchrist & Island*, 11 Ont. R. 537; *Clark* v. *Harvey*, 16 Ont. R. 159. See also R.S.O. c. 112, s. 27, it is incumbent on the conveyancer to make an additional stipulation that after default for a longer period than that mentioned in the power, the mortgagee may sell without notice.

As regards the clause or covenant providing that notice be given before sale under the power, if assigns are to receive notice, ample scope should be given as to the mode of giving it, and it might be provided that the notice need not be personal, but may be left on the premises, and need not be addressed to any person by name or designation, or may be sent by post addressed to the party at the post office next his residence. Where the power required the notice to be served on the mortgagor, "his heirs, executors, or administrators;" it was held that a notice given after a mortgagor's death should have been served upon both the heir and administrator, *Bartlett* v. *Jull*, 28 Gr. 142. And where the notice is to be served on the mortgagor, his heirs, or assigns, and the mortgagor has made a second mortgage, the notice must be served upon both the mortgagor and his assign, the second mortgagee, *Hoole* v. *Smith*, 17 Ch. D. 434. This may be provided against by stipulating that the notice may be served on all the persons named, "or some or one of them," *Bartlett* v. *Jull*, *supra*.

Although personal service on the mortgagor is requisite, yet, where a notice of sale was served on an agent of the mortgagor who subsequently transmitted it to the mortgagor, who received it in time, it was held to be sufficient, *Fenwick* v. *Whitwam*, 1 O.L.R. 24.

It is most inadvisable to omit a separate power for sale without notice; because if the mortgagor should die intestate and no letters of administration should be applied for the mortgagee cannot proceed as there is no one upon whom notice could be served.

An execution creditor whose writ is in the sheriff's hands at the time of giving the notice of sale has been said to be an "assign" entitled to notice, *Re Abbott & Metcalfe*, 20 O.R. 299, although the interest of the mortgagor is such that it could not be sold under the writ, *Glover* v. *Southern Loan Co.*, 1 O.L.R. 590. But see *Ashburton (Lord)* v. *Norton*, [1914] 2 Ch. 211.

It is important, also, to provide that any sale purporting to be made by the mortgagee shall be valid as regards the purchaser in all events of impropriety in the sale, leaving the former personally liable for improper conduct, if any; and that the purchaser shall not be bound to enquire as to whether notice has been given, or default made, or otherwise as to the validity of the sale. In the absence of such a clause the mortgagee selling may sometimes have difficulty in enforcing the sale against an unwilling purchaser, see *Hobson* v. *Bell*, 2 Beav. 17; *Ford* v. *Heely*, 3 Jur. N.S. 1116; *Forster* v. *Hoggart*, 15 Q.B. 155; *Dicker* v. *Angerstein*, 3 Ch.D. 600. But such a clause will not protect a purchaser who has express notice that the notice of sale stipulated for has not been given, *Parkinson* v. *Hanbury*, 2 D.J. & S. at p. 452; *Selwyn* v. *Garfit*, 38 Ch.D. 273.

Where the mortgagee proceeds under the statutory power given by the Mortgage Act, R.S.O. ch. 112, sec. 19, and has made a conveyance to the purchaser, the latter's title cannot be impeached on the ground that no case had arisen for exercising the power of sale, or that the power had been improperly or irregularly exercised, or that notice had not been given, but the person damnified is to have his remedy against the person exercising the power, R.S.O. ch. 112, sec. 22.

The power usually authorizes a sale by private contract or at public auction, for cash or on credit, in one parcel or in lots, from time to time, under any special conditions of sale as to title or otherwise, with power at any sale at auction to buy in and re-sell, without being responsible for any loss or diminution of price occasioned thereby, and to rescind or vary any contract of sale that may have been entered into, *Dudley* v. *Simpson*, 2 Ch. App. 102.

On any sale under the power, the vendor must be careful so to act that the interests of the mortgagor be not prejudiced by any negligence or misconduct. The duty of a mortgagee on a sale by him resembles that of a trustee for sale, *Richmond* v. *Evans*, 8 Gr. 508; *Latch* v. *Furlong*, 12 Gr. 306, though he is not a trustee but has a beneficial interest in realizing so as to recover his money, see *Kennedy* v. *DeTrafford*, [1897] A.C. 180, as to his duties. A greater latitude may be allowed to a mortgagee than to a bare trustee not interested in the proceeds, and the Court might restrain a sale by a trustee under circumstances in which they would not restrain a mortgagee, (as to cases wherein the Court declined to interfere: *Matthie* v. *Edwards*,

11 Jur. 761; *Kershaw* v. *Kalow*, 1 Jur. N.S. 974; see also *Falkner* v. *Equitable Society*, 4 Drew. 352. It is more advisable, of course, in order to avoid any ground of complaint of insufficiency of price or of unfair sale, that the property should be sold at public auction, instead of by private contract, even though the power authorize the latter. In one case where the mortgagee expressed a desire to get his debt only, and made no effort to sell, and never having advertised, sold at private sale at a great undervalue, the sale was set aside, though it did not appear that the purchaser was aware of the negligence of the mortgagee, *Latch* v. *Furlong*, 12 Gr. 303. Due notice by advertisement of the intended sale should be given, and perhaps as to this the practice which governs on sales by the direction of the Court would be the safest guide. Unnecessary and too stringent conditions of sale as to title and production of title deeds or otherwise should be avoided as likely to prejudice the sale; and if in this or other respects the conduct of the mortgagee be improper, not only will he be held responsible, but under circumstances the sale may be set aside, *Richmond* v. *Evans*, 8 Gr. 508; *Jenkins* v. *Jones*, 2 L.T.N.S. 128; *Latch* v. *Furlong*, 12 Gr. 303; *McAlpine* v. *Young*, 2 Ch. Ch. 171. As to depreciatory conditions, see *Falkner* v. *Equitable Rev. Society*, 4 Drew. at p. 355; but the circumstances must be very strong to induce the Court to set aside a sale as against a purchaser acting *bonâ fide*, and if the sale were set aside as against such purchaser, he might be allowed for his improvements, *Carroll* v. *Robertson*, 15 Gr. 173.

A mortgagee cannot purchase at a sale under his power, and, notwithstanding any such purchase, he will still continue mortgagee, and liable to redemption. His duty as vendor is to obtain as much as possible for the property, his interest as purchaser is the reverse of this, viz., that the property shall sell for as low a price as possible. Courts of equity forbid a man placing himself in this position, wherein his interest may conflict with his duty. Neither can an agent of the mortgagee buy for him, nor his solicitor's clerk, *Ellis* v. *Dellabough*, 15 Gr. 583; *Nelthorpe* v. *Pennyman*, 14 Ves. 517; *Howard* v. *Harding*, 18 Gr. 181, nor his solicitor, either for himself or the mortgagee, *Downs* v. *Grazebrook*, 3 Mer. 200; *Whitcomb* v. *Minchin*, 5 Madd. 91. Nor can the secretary or manager of a company (mortgagees) buy at a sale by the company, *Martinson* v. *Clowes*, 21 Ch.D. 857. But a second mortgagee buying on a sale by the first mortgagee, under a power of sale in his mortgage, takes the estate as any stranger, free from the equity of redemption, *Shaw* v. *Bunny*, 2 D. J. & S. 468; *Parkinson* v. *Hanbury*, 2 D.J. & S. 450; *Watkins* v. *McKellar*, 7 Gr. 584; *Brown* v. *Woodhouse*, 14 Gr. 684. And if the mortgage of the second mortgagee be *in trust* for sale on default, instead of with the usual power of sale, so that the mortgagee stands more in the position of a trustee, it is said, *Kirkwood* v. *Thompson*, 2 D. J. & S. 613; but see *Parkinson* v. *Hanbury*, 2 D.J. & S. 450, even then he can purchase from a prior mortgagee.

Whoever is entitled to the right to redeem is the person who is entitled to the residue of the property left unsold after satisfaction of the mortgage debt, and the surplus proceeds if all be sold. Before the Devolution of Estates Act, if the mortgagor of a freehold did not intend this, but intended a conversion in the event of a sale, and that the proceeds shall go as personal estate, then that should have been clearly expressed; for when there was a

mere power and not an absolute trust for sale, and a sale took place *after* the death of the mortgagor, the surplus proceeds went to the heir, even though the trust of them should have been declared in favour of the personal representatives, *Wright* v. *Rose*, 2 Sim. & Stu. 323; *Bourne* v. *Bourne*, 2 Ha. 35 But since that Act, if the sale be made before the land shifts unto the heirs the surplus must go to the personal representative. But if the sale takes place after the land vests in the heirs, the former law will prevail. On a badly drawn mortgage, by inattention to the above, the mortgagee may frequently be misled into payment to the wrong party. Where a sale is had in the lifetime of the mortgagor, the surplus proceeds will go to personal representatives on his death before payment. The general principle is, that the property or its proceeds will, where there is a mere power of sale, go to real or personal representatives, according to the state in which it was on the death of the mortgagor.

The mortgagee, in distributing the surplus purchase-money, is under an obligation to see that it is properly applied, and that collateral securities held by subsequent incumbrancers are saved for those entitled to them, *Glover* v. *Southern Loan Co.*, 1 O.L.R. 59; so held by the majority of the Court.

The effect of giving notice of exercising the power of sale is to stay all proceedings for the time (if any) mentioned in the notice for payment, even the proceedings under the notice itself, R.S.O. ch. 112, sec. 29. The original statute providing for this, declared that no further proceedings "at law or in equity" should be taken, and no suit or action should be brought, the purpose being to prevent the making of unnecessary costs. After the Judicature Act was passed, and the distinction between Courts of law and equity was abolished, the words, "at law or in equity," were dropped out of the Act in the next revision of the statutes. The Act in that condition simply declares that no further proceedings and no action shall be taken, after a notice given, until the expiration of the time mentioned in the notice. Hence it was held that further proceedings for sale under the power itself were included in the enactment, and notice to sell has therefore the effect of staying proceedings to sell, *Smith* v. *Brown*, 20 O.R. 165; *Lyon* v. *Ryerson*, 17 P.R. (Ont.) 516. It is not necessary to demand the money in a notice of sale, or to fix or mention any time in the notice for doing anything required to be done, although the amounts claimed for principal, interest and costs, respectively, must be stated in the notice, R.S.O. ch. 112, sec. 28. But if any time is mentioned, it should be forthwith, in order to prevent the notice from operating as a stay. The enactment in question authorizes an application to the Court for leave to bring an action, notwithstanding the stay, and the motion may be made *ex parte*, and is never refused when the desire is to recover possession in anticipation of being obliged to deliver the land to a purchaser. But this section does not apply to proceedings to stay waste or other injury to the mortgaged property. The notice operates as a stay, whether the action is commenced before or after the notice is given, *Perry* v. *Perry*, 10 P.R. (Ont.) 275; *Lyon* v. *Ryerson*, 19 P.R. (Ont.) 516.

Where a deed is absolute in form, but is, in reality, a security for money lent, no power of sale is implied in it, and the grantee cannot sell without the concurrence of the *cestui que trust*, *Hetherington* v. *Sinclair*, 34 O.L.R. 61; 23 D.L.R. 630.

Boyd, C.] RE CUTTER. [13 D.L.R. 382.

Wills—Life estate—Remainder over—"Revert."

Where a testator leaves all the residue of his estate to a named person, and then says that on the decease of such person "the unused or unexpended balance shall revert," an apparently absolute gift is cut down to a life estate; if the life tenant be one for whose maintenance the testator was evidently providing, the whole residue may be employed for that purpose, in specie, and if necessary the capital may be encroached upon.

R. G. Smythe, for appellants.

D. Inglis Grant, for Rose A. Cutter.

ANNOTATION ON THE ABOVE CASE FROM D.L.R.

Before the enactments presently referred to, words of limitation were necessary in a will to pass the fee. But the intention to pass the fee might appear from other clear expressions of the will. Thus, a devise to J. D. "for his children" passed a life estate only. *Hamilton* v. *Dennis*, 12 Gr. 325.

After devises in tail to children, and a residuary devise of all property "not herein mentioned," there followed a devise of lands specifically to J. K. and J. S., without words of inheritance. Held, that J. K. and J. S. took estates for life only, and that the reversion passed to the residuary devisees. *Doe dem. Ford* v. *Bell*, 6 U.C.Q.B. 527.

A devise of all the lands that might belong to the testator at the time of his death did not indicate an intention to pass the fee. Nor did a devise to J., provided that if he died before the testator, then to B., give J. more than a life estate on his surviving the testator. *Doe dem. Paddock* v. *Green*, 7 N.B.R. 314.

A reference to "estate" might have indicated that the fee passed; but it must clearly have referred to the testator's interest in the land, and have been directly connected with the devise in question. So, on a devise to a widow of the income of "all my real estate" during her life, and after her death the same lands to go to children to be divided equally amongst them, it was held that even if the word "estate," as used in the devise to the widow, were sufficient to indicate an intention to pass the fee, the word had no relation to the devise to the children, and that they took life estates only. *Doe dem. Whitney* v. *Stanton*, 7 N.B.R. 632.

But a charge imposed upon a devisee of land gave him the fee, no words of limitation being used. *Chisholm* v. *Macdonnell*, 7 N.B.R. 137.

In Ontario, after March 6, 1834, on a devise of lands, "it shall be considered that the devisor intended to devise all such estate as she was seised of in the same land, whether in fee simple or otherwise, unless it appears upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seised of at the time of making the will containing such devise." R.S.O. 1914 ch. 120, sec. 4.

And by the Wills Act, "where any real estate is devised to any person without any words of limitation, such devise shall [subject to the *Devolution of Estates Act*], be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears by the will." R.S.O. ch. 120, sec. 31.

In British Columbia the same enactment except the words in brackets, is in force. R.S.B.C. ch. 241, sec. 25.

In Manitoba, on and after May 30, 1882; in New Brunswick, on and after January 1, 1839; and ih Nova Scotia, on and after October 30, 1840, the same enactment, except the words in brackets came into force.

Since these enactments, restrictive words are necessary in order to cut down an indefinite devise to a life estate.

"My wife shall be allowed to live on the said property during the term of her natural life," gives a life estate. *Fulton* v. *Cummings*, 34 U.C.Q.B. 331.

A similar devise to a daughter as long as she remained unmarried gives an estate during the residence on the land unmarried. *Judge* v. *Splann*, 22 O.R. 409.

A devise to A. in fee, subject to the condition that daughters should "have at all times a privilege of living on the homestead and of being maintained out of the proceeds of the said estate during their natural lives," gives a life estate to the daughters. *Bartels* v. *Bartels*, 42 U.C.Q.B. 22.

A devise in fee, with a direction that the testator's daughters and their mother should have "a lien on said lands for a home during their natural lives" gives a life estate to the daughters. *Scouler* v. *Scouler*, 8 C.P. 9.

A devise to a widow of "her life in the said lot" gives her a life estate. *Smith* v. *Smith*, 18 O.R. 205.

A devise to children, "reserving to my wife, as long as she remains my widow, the revenues and incomes therefrom," gives an estate to the widow *durante viduitate*. *King* v. *Murray*, 22 N.B.R. 382.

A devise to a wife "to be at her will and disposal during her natural life," with a devise over, gives a life estate only to the wife. *Doe dem. Keller* v. *Collins*, 7 U.C.R. 519.

But a devise to a wife for life, with a general power of disposal by will, gives a fee simple. *Re Bethune*, 7 O.L.R. 417.

Semble, that a devise to H. for her own use, with power to sell or dispose of the same as she may see fit, followed by a devise that after her death "the remainder of my estate, if any, be equally divided between, etc.," gives A., a life estate only. *Roman Catholic Episcopal Corpn.* v. *O'Connor*, 14 O.L.R. 666.

A vested remainder in fee, after a life estate with power of sale in the life tenant, is not affected if the power is not exercised. *Doe dem. Savoy* v. *McEachren*, 26 N.B.R. 391.

As to whether a devise for life, with a power of appointment amongst sons of the devisee creates a power or a trust, *quære*. *McMaster* v. *Morrison*, 14 Gr. 138; *Pettypiece* v. *Turley*, 13 O.L.R. 1.

A devise to D. for life, "and to her children, if any, at her death, if no children," then over, gives a life estate to D., with remainder to children. *Grant* v. *Fuller*, 33 Can. S.C.R. 34; *Young* v. *Denike*, 2 O.L.R. 723; *Sweet* v. *Platt*, 12 O.R. 229.

A devise to A. "and his heirs and executors forever," proviso, "that he neither mortgage nor sell the place, but that it shall be to his children after his decease," was said to indicate an intention that A. should not have such an interest as would enable him to defeat his children, and therefore that he took an estate for life only, remainder to his children. *Dickson* v. *Dickson*, 6 O.R. 278. *Sed quære*, an estate in fee having been given by technical words.

A devise to a widow for life, followed by a devise of "everything real and personal within and without, and it is hereby understood that the property above described shall be under the control of my said wife. After the decease of my wife . . . to my nephew and his heirs," gives a life estate to the widow; the estate not being enlarged by the expression "everything real and personal," because the remainder was clearly given to the nephew. *Clow* v. *Clow*, 4 O.R. 355.

A devise to a widow for life, remainder to two sons "during the full term of their natural lives . . . and if either . . . should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share . . . and after the decease of both of my said sons" sale and division of the proceeds amongst their heirs "then surviving." Held, a life estate for the joint lives of the two sons, remainder in fee to the persons answering the description of the heirs of the two sons at the death of the survivor of them. *Haight* v. *Dangerfield*, 5 O.L.R. 274.

A devise to a husband and wife "and to their children and children's children forever . . . " provided that the husband and wife should not be at liberty to convey, "as it is my will that the same may be entailed for the benefit of their children," gives a life estate to the husband and wife. The explanation that the "children" were to have a fee tail indicates that the words "children and children's children" are not words of limitation of the estate of the husband and wife. *Peterborough R. E. Co.* v. *Patterson*, 15 A.R. (Ont.) 571.

A devise to A. for life and at his decease to the "second male heir of him and his present wife and his heirs male forever, and in default of a second male heir to the eldest surviving female heir or child and her male heirs forever" gives A. an estate for life, remainder to a daughter (there being only one son) in fee tail male. *Re Brown & Slater*, 5 O.L.R. 386.

A devise to S. H. G. of "the use of my farm . . . also to his lawful children, and in case of his death without children, then to . . . daughters and their heirs forever," gives S. H. G. a life estate only. S. H. G. having the use, it was held that the children (of whom the only one at the date of the will was *en ventre*) could not share with him; nor could that child exclude after-born children who might be alive at the death of S. H. G. In order, therefore, to give both S. H. G. and all his children an interest, it was held that S. H. G. took a life estate, remainder to his children living at his death; and in default of such children, then over. *Gourley* v. *Gilbert*, 12 N.B.R. 80.

A devise to G. for life and if he marries to his wife for life, and on the death of both to his children and their heirs, gives G. a life estate, remainder to his wife for life, remainder in fee to children. *Re Sharon & Stuart*, 12 O.L.R. 605.

A devise of all real and personal property to the testator's widow, followed by a declaration that "my wish and desire is that she divide" in certain proportions amongst the testator's children, held to give a life estate to the widow, in order to prevent a complete exclusion of the widow who was evidently intended to be benefitted. *Wilson* v. *Graham*, 12 O.R. 469.

Similarly, a devise to A. generally, with a restraint on alienation and against waste, followed by a disposition amongst his children after his death, according to the discretion of the executors of the testator, gives A. a life estate only. *McPhail* v. *McIntosh*, 14 O.R. 312.

So, also, a devise on trust for sale, and to invest the proceeds for maintenance of the devisee and her children, and till sale to take the rents and profits for the life of the devisee, gives an estate for life only with a power of sale. *Re O'Sullivan*, 5 N.S.R. 549.

A devise of the "possession, use, and occupation" of land and all the rents and profits of all the estate to a widow "for the support of herself and children," with a proviso that if the rents and profits are not sufficient resort may be had to principal, and a direction that what remains at the death of the widow shall go to the children, gives a life estate to the widow. *Knapp* v. *King*, 15 N.B.R. 309.

Where, after a direction to convert, the testator bequeathed a portion of the proceeds to M. S., with a proviso that M. S.'s interest s ould not be transferable or transferred to any other person, but might be inherited by her children, and in case M. S. died without legitimate issue, then, that her interest should "revert back" to other legatees, it was held that M. S. took a life estate only. *Jeffrey* v. *Scott*, 27 Gr. 314.

Province of Manitoba.

KING'S BENCH.

Macdonald, J.] PEDERSON *v.* PATERSON. [31 D.L.R. 308.

Negligence—Nuisance—Automobile—Fright to horse by wrecked car—Unlicensed driver.

The leaving of a wrecked motor car on the side of the road is not necessarily negligence, nor does it amount to an unreasonble user of the highway, entitling the owner of a runaway horse, frightened by the wreck, to damages. Neither is the owner liable by reason that at the time the motor was wrecked it was being driven by an unlicensed driver.

Kilgour, K.C., for plaintiff.

Symington, K.C., for defendant.

ANNOTATION ON THE ABOVE CASE FROM D.L.R.

Anything which essentially interferes with the enjoyment of life and property is a "nuisance"; 29 Cyc. 1152. When it affects the rights enjoyed

by citizens, as obstruction of a highway, it is a "public nuisance." An individual who suffers pecuniary damage as a direct consequence of such obstruction may maintain an action as for a private nuisance. 10 Cyc. of Eng. 81. "The question of negligence is not involved in an action for a nuisance," 29 Cyc. 1155. "If there be an act done upon a part of the highway which is not a reasonable user of it, and which has the effect of endangering its use to others, and damage results from such to one in the course of a lawful user of the highway, an action will lie for such damage." *Harris* v. *Mobbs*, 3 Ex. D. 268.

In *Wilkins* v. *Day*, 12 Q.B.D. 110, plaintiff's pony shied at the shafts of a roller slightly projecting from the side of a road, over the metalled part of the road; plaintiff's wife was thrown out and killed; plaintiff was held entitled to recover.

"The law of negligence is brought into intimate association with the law of nuisance. So far as nuisance is caused by imperfect action, or omission to act, where the action of a prudent man, according to the circumstances, is demanded, it may be proceeded against indifferently as a negligent act or a nuisance. Cases which involve infringements of public rights are more usually proceeded against as nuisances than for negligence. Beven on Negligence, Can. ed., 386.

The cases cited above (*Harris* v. *Mobbs* and *Wilkins* v. *Day*), were for nuisances. The form of action given in Bullen & Leake's Precedents, for an obstruction of a highway resulting in private damage, is for a nuisance.

In *Pederson* v. *Paterson* (above) the real point at issue was this, was the obstruction which the burned car caused to the highway a reasonable user thereof. It was of no importance, therefore, how the car got into the ditch, or that the driver was unlicensed, for the car in the roadway was clearly the proximate cause of the runaway horse. As to that the motto *res ipsa loquitur* seems undoubtedly applicable.

Was it a reasonable user of the highway to leave the burned car in the side of the road, unguarded and uncovered, after seven o'clock on Sunday morning? The result proves that it was calculated to frighten a horse, not shewn to be other than normal. It is not said that any attempt was made to move the car from the roadway after the defendant was shewn its position. Surely the onus at least was on him to shew that he had done all that was reasonably possible to avoid danger to travellers. It does not appear that he thought of that obligation.

The trial Judge said "negligence is the foundation of the action. Before the plaintiff can recover he must bring that home to the defendant." Is not that misplacing the burden of proof? But even so, upon the ground *res ipsa loquitur*, was not the defendant bound to prove that leaving his car in such a position and condition was not negligence; should he not have been called upon to prove that the car could not have been moved on Sunday morning, or that it could not have been rendered less likely to frighten horses? On this ground of negligence, the ditching of the car and even the burning of the car—both of which caused the condition which frightened the horse—were *primâ facie* proof of negligence; prudent people do not inspect wrecked cars with lighted matches. It is on this point that the fact that the car was not driven by a licensed person may be of some evidentiary value.

War Notes.

The Allies and German Peace Proposal.

Perhaps the most important official document that has been issued since the declaration of war is the answer of the allied powers to the note delivered to them by the President of the United States in reference to the suggestions for peace (or peace proposals as the Germans would call them) of the central powers. Our readers will be glad to have this on record, and we therefore make no apology for publishing it.

"The allied Governments have received the note which was delivered to them in the name of the Government of the United States on the 19th of December, 1916. They have studied it with the care imposed upon them both by the exact realization which they have of the gravity of the hour and by the sincere friendship which attaches them to the American people.

"In a general way they desire to declare their respect for the lofty sentiments inspiring the American note and their whole-hearted agreement with the proposal to create a league of nations, which shall assure peace and justice throughout the world. They recognize all the advantages for the cause of humanity and civilization which the institution of international agreements, destined to avoid violent conflicts between nations, would prevent; agreements which must imply the sanctions necessary to insure their execution and thus to prevent an apparent security from only facilitating new aggression. But a discussion of future arrangements for assuring a durable peace pre-supposes a satisfactory settlement of the present conflict; the allies have as profound a desire as the Government of the United States to terminate as soon as possible a war for which the Central Empires are responsible, and which inflicts such cruel sufferings upon humanity. But in their judgment it is impossible to obtain at this moment such a peace as will not only secure to them the reparation, the restitution and the guarantees justly due them, by reason of the act of aggression, the guilt of which is fixed upon the Central Powers, while the very principle from which it sprang was undermining the safety of Europe; and at the same time such a peace as will enable future European nations to be established upon a sure foundation. The allied nations are conscious that they are not fighting for selfish interests, but, above all, to safeguard the independence of peoples, of right and of humanity

"The allies are fully aware of the losses and sufferings which

the war causes to neutrals as well as to belligerents, and they deplore them; but they do not hold themselves responsible for them, having in no way either willed or provoked this war, and they strive to reduce these damages in the measure compatible with the inexorable exigencies of their defence against the violence and the wiles of the enemy.

"It is with satisfaction, therefore, that they take note of the declaration that the American communication is no wise associated in its origin with that of the Central Powers transmitted on the 18th of December by the Government of the United States. They did not doubt, moreover, the resolution of that Government to avoid even the appearance of a support, even moral, of the authors responsible for the war.

"The allied Governments feel it their duty to challenge in the most friendly, but also in the clearest way, the analogy drawn between the two groups of belligerents. This analogy, based on public declarations of the Central Powers, is in direct conflict with the evidence, both as regards responsibility for the past and guarantees for the future. President Wilson, in alluding to this analogy, did not, of course, intend to adopt it as his own.

"If there is an historical fact established at the present date, it is the willful aggression of Germany and Austria-Hungary to insure their hegemony over Europe and their economic domination over the world. By her declaration of war, by the instant violation of Belgium and Luxemburg, and by her methods of warfare, Germany has proved that she systematically scorns every principle of humanity and all respect due to small States. More and more, as the struggle has progressed, has the attitude of the Central Powers and their allies, been a constant challenge to humanity and civilization. Is it necessary to recall the horrors that marked the invasion of Belgium and of Serbia, the atrocious regime imposed upon the invaded countries, the massacre of hundreds of thousands of inoffensive Armenians, the barbarities perpetrated against the populations of Syria, the raids of Zeppelins on open towns, the destruction by submarines of passenger steamers and of merchantmen even under neutral flags, the cruel treatment inflicted upon prisoners of war, the juridical murders of Miss Cavell, of Captain Fryatt, the deportation and the reduction to slavery of civil populations, etc.? The execution of such a series of crimes perpetrated without any regard for universal reprobation fully explains to President Wilson the protest of the allies.

"They consider that the note which they sent to the United States in reply to the German note will be a response to the

questions put by the American Government and according to the exact words of the latter, constitute a 'public declaration as to the conditions upon which the war could be terminated.'

"President Wilson desires more: he desires that the belligerent powers openly affirm the objects which they seek by continuing the war; the allies experience no difficulty in replying to this request. Their objects in the war are well known; they have been formulated on many occasions by the chiefs of their divers Governments. Their objects in the war will not be made known in detail with all the equitable compensations and indemnities for damages suffered until the hour of negotiations. But the civilized world knows that they imply in all necessity and in the first instance the restoration of Belgium, of Serbia, and of Montenegro, and the indemnities which are due them; the evacuation of the invaded territories of France, of Russia, and of Roumania with just reparation; the reorganization of Europe, guaranteed by a stable settlement, based alike upon the principle of nationalities, on the right which all peoples, whether small or great, have to the enjoyment of full security and free economic development, and also upon territorial agreement and international arrangements so framed as to guarantee land and sea frontiers against unjust attacks; the restitution of provinces or territories wrested in the past from the allies by force or against the will of their populations, the liberation of Italians, of Slavs, of Roumanians and of Tcheco-Slovaques from foreign domination; the enfranchisement of populations subject to the bloody tyranny of the Turks; the expulsion from Europe of the Ottoman Empire, which has proved itself so radically alien to Western civilization. The intentions of His Majesty the Emperor of Russia regarding Poland have been clearly indicated in the proclamation which he has just addressed to his armies. It goes without saying that while the allies wish to liberate Europe from the brutal covetousness of Prussian militarism, it never has been their design, as has been alleged, to encompass the extermination of the German peoples and their political disappearance. That which they desire above all is to insure a peace upon the principles of liberty and justice, upon the inviolable fidelity to international obligation, with which the Government of the United States has never ceased to be inspired.

"United in the pursuit of this supreme objective the allies are determined, individually and collectively, to act with all their power and to consent to all sacrifices to bring to a victorious close a conflict upon which they are convinced not only their own safety and prosperity depends, but also the future of civilization itself."

The translation of the Belgian note, which was handed to Ambassador Sharp with the Entente reply, follows:

"The Government of the King, which has associated itself with the answer handed by the President of the French Council to the American Ambassador on behalf of all, is particularly desirous of paying tribute to the sentiment of humanity which prompted the President of the United States to send his note to the belligerent powers, and it highly esteems the friendship expressed for Belgium through his kindly intermediation. It desires as much as Mr. Woodrow Wilson to see the present war ended as early as possible.

"But the President seems to believe that the statesmen of the two opposing camps pursue the same objects of war. The example of Belgium unfortunately demonstrates that this is in no wise the fact. Belgium has never, like the Central Powers, aimed at conquests. The barborous fashion in which the German Government has treated, and is still treating, the Belgian nation does not permit the supposition that Germany will preoccupy herself with guaranteeing in the future the rights of the weak nations which she has not ceased to trample under foot since the war, let loose by her, began to desolate Europe. On the other hand, the Government of the King has noted with pleasure and with confidence the assurances that the United States is impatient to co-operate in the measures which will be taken after the conclusion of peace to protect and guarantee the small nations against violence and oppression.

"Previous to the German ultimatum, Belgium only aspired to live upon good terms with all her neighbors; she practised with scrupulous loyalty towards each one of them the duties imposed by her neutrality. In the same manner she has been rewarded by Germany for the confidence she placed in her, through which from one day to the other, without any plausible reason, her neutrality was violated, and the Chancellor of the empire, when announcing to the Reichstag this violation of right and of treaties, was obliged to recognize the iniquity of such an act, and predetermine that it would be repaired. But the Germans, after the occupation of Belgian territory, have displayed no better observance of the rules of international law or the stipulations of The Hague Convention. They have, by taxation, as heavy as it is arbitrary, drained the resources of the country; they have intentionally ruined its industries, destroyed whole cities, put to death and imprisoned a considerable number of inhabitants. Even now, while they are loudly proclaiming their desire to put an end to the horrors of war, they increase the rigours of the oc-

cupation by deporting into servitude Belgian workers by the thousands.

"If there is a country which has the right to say that it has taken up arms to defend its existence, it is assuredly Belgium. Compelled to fight or to submit to shame, she passionately desires that an end be brought to the unprecedented sufferings of her population. But she could only accept a peace which would assure her, as well as equitable reparation, security and guarantees for the future.

"The American people, since the beginning of the war, have manifested for the oppressed Belgian nation its most ardent sympathy. It is an American committee, the Commission for Relief in Belgium, which, in close union with the Government of the King and the National Committee, displays an untiring devotion and marvellous activity in revictualling Belgium. The Government of the King is happy to avail itself of this opportunity to express its profound gratitude to the Commission for Relief, as well as to the generous Americans eager to relieve the misery of the Belgian population. Finally, nowhere more than in the United States have the abductions and deportations of Belgian civilians provoked such a spontaneous movement of protestation and indignant reproof.

"These facts, entirely to the honor of the American nation, allow the Government of the King to entertain the legitimate hope that at the time of the definitive settlement of this long war, the voice of the Entente powers will find in the United States a unanimous echo to claim in favor of the Belgian nation, innocent victim of German ambition and covetousness, the rank and the place which its irreproachable past, the valor of its soldiers, its fidelity to honour and its remarkable faculties for work assign to it among the civilized nations."

Bench and Bar.

Judicial Appointments.

Robert Ruddy, of the City of Peterborough, in the Province of Ontario, K.C., to be Junior Judge of the County Court of the County of Ontario, in the said Province. (Jan. 1.)

Right Hon. James H. Campbell, K.C., Attorney-General of Ireland, has been elevated to the office of Lord Chief Justice and

made a Baronet. It is said that he will be a great acquisition to the Bench, having been for many years at the head of the Common Law Bar. Mr. James O'Connor becomes Attorney-General.

Hamilton Law Association.

The annual meeting of the Trustees of the Hamilton Law Association was held on January 9th. Mr. William Bell, K.C., was elected President of the Association in the place of the late S. F. Lazier, K.C., Mr. T. C. Haslett, K.C., was elected Vice-president of the Association. There is a membership of 85. Three members of the Association have already died for their King and Country namely: Thomas Crosthwaite, Ernest Appleby and Herbert Daw.

Death Roll of 1916.

Mr. Clarence Bell in his useful circuit guide for Ontario practitioners has published a list of the members of the Legal profession of that Province who have died during the last year. It appears to comprise an unusually large number of our prominent, men. Besides two Judges of the Supreme Court of Ontario, we have lost four County Court Judges, and three Crown Attorneys and fifteen of His Majesty's Counsel. Among the more prominent of the latter being G. H. Shepley, Treasurer of the Law Society; Hon. J. J. Foy, an Ex-Attorney-General; C. H. Ritchie, A. R. Creelman, John McIntyre, John King and E. H. Tiffany. We have given in our War Notes the names of our professional brethren who have given their lives for the Empire so far as we have been able to ascertain them.

Flotsam and Jetsam.

Solicitors and the Future.

One question which the thoughtful lawyers are beginning to consider is the inevitable changes which the future will bring about in the activities of our profession. Such changes are bound to come; that is one of the invariable results of a great war. For war inevitably destroys capital and therefore, to a certain extent, reduces an old country to the status of a new one until it has had time to recuperate and build up its civiliza-

tion once more. Now there are three great characteristics of a new country, such as Canada—to take the nearest example. It is full of new enterprises. It is in great need of capital: There is less specialization in it; the professions are businesses, are not marked off so clearly from one another. Thus in British Columbia, before the war, a solicitor was generally a great many things besides a mere lawyer. He was usually an estate agent, who helped in the development of land and minerals; a financial agent, who brought the farmer in touch with the banker and the investor; and, in a small way, a stockbroker as well. Moreover, he not infrequently abandoned his own practice to enter business or run a mine. Something of the kind, *mutatis mutandis* of course, we expect to happen in England. The solicitor of the future will tend to be less of a legal adviser and a conveyancer, more of an estate agent and a man of business than he has been in the past. Some of us, who love the old ways of the *ancien régime*, will regret the change. But changes cannot be prevented by those of us who would prefer the rôle of a *laudator temporis acti*.—*Solicitors' Journal*.

Peking's Ancient Library.

The library of the "School of the Sons of the Empire," an ancient Chinese university, which, it is claimed, was in existence a thousand years before the Christian era, comprises 182 tablets of stone, whereon are carved all of the "Thirteen Classics," the essence of Chinese culture.

This stone library is not, however, of the same age as the "School of the Sons of the Empire." It probably dates from a late period of the Mongol or an early period of the Ming dynasty. In the north-east of Peking stand the buildings of the old university, long since abandoned as a place of instruction or inspiration in letters.

In the Imperial lecture hall of this "School of the Sons of the Empire" (Kuo Tze-Chien) the Emperor would go, once a year, to hear a discourse on the responsibilities and duties of his office, and to receive reproof and exhortation from the heads of the institution. This practice was retained down to the time of Chien Lung, the great Emperor of the Manchus, in the eighteenth century, a patron of the arts and literature. The stone library in Peking is only a copy of that in Shianfu, in Shensi, which was the capital of the empire.

The reason for carving the classics on stone is not clear. It

may have been done in order that there might remain a standard of the works in the land. It is more probable, however, that these classics carved on stone were safer from destruction at the hands of vandals than would be the case were they preserved on paper or wood.—*Philadelphia Record.*

FOLLOWING PRECEDENTS.—One of the Judges of the Colorado Supreme Court recently took exception to a slavish following of precedents. In a case before him he quoted the quaint philosophy of Sam Walter Foss, who wrote some well known lines familiar to most New York lawyers who have to use a queer winding street in that great city. We have only place for a few of them:—

One day through the primeval wood
A calf walked home, as good calves should;
And left a trail all bent askew,
A crooked trail, as all calves do.
Since then, three hundred years have fled,
And, I infer, the calf is dead,
But still he left behind his trail,
And thereby hangs my moral tale.

And many men wound in and out,
And bent and turned and dodged about,
And uttered words of righteous wrath,
Because 'twas such a crooked path;
But still they followed—do not laugh—
The first migrations of that calf;
And through this winding woodway stalked
Because he wabbled when he walked.

A hundred thousand men were led
By one calf near three centuries dead.
They followed still his crooked way,
And lost one hundred years a day;
For thus such reverence is lent
To well-established precedent.
A moral lesson this might teach,
Were I ordained and called to preach.

Canada Law Journal.

VOL. LIII. TORONTO, FEBRUARY, 1917. No. 2

THE DIGNITY OF THE BENCH

A representative legal journal cannot well ignore, much as we might wish to, occurrences such as those which recently took place in Manitoba in regard to an investigation held there by a learned Judge, sitting as a Commissioner, appointed by the government to take evidence and report as to certain alleged abuses in connection with a government contract.

Unfortunately this investigation brought up political disputes and recriminations which led to unseemly criticisms in which the learned Judge came in for a large measure of abuse. Of the rights or wrongs we know nothing and they do not interest us; but the dignified and efficient administration of justice is important to all, and anything which affects it prejudicially should not be allowed to pass without protest.

Whilst it may be desirable from time to time for a government to investigate alleged scandals or improper practices, it is most unwise that any Judge should be asked to adjudicate upon such matters. Judges, moreover, when asked to act as commissioners in such matters, would do well to decline. They have their proper duties to perform and should not be asked to go outside their own sphere of duty. In doing so they step down from their high estate, and there is always trouble when they do.

It may well be supposed that when Judges are appointed in such matters it is because it is imagined that the finding of a person occupying a judicial position would give the finding a judicial complexion, and so carry weight with the public. And then these Judges must remember that, when acting as commissioners and not as Judges, their acts are open to adverse criticism to an extent which would not be proper or even possible if they were acting within their legitimate judicial sphere. The unfortunate result too often is that the ermine is besmirched and the due and dignified administration of justice more or less injured.

SUMMARY TRIALS FOR THEFT.

A correspondent called attention in our last issue to a recent decision of the First Appellate Division of the Supreme Court of Ontario in the case of *Rex* v. *Sinclair*, which, if it be a correct exposition of the law, indicates that on the point in question it is in a truly deplorable condition. In cases of theft of less than $10, a Police Magistrate of a city of over 25,000 inhabitants has an absolute authority to try and convict the accused under sec. 777 (5) of the Cr. Code; and may inflict a punishment of fourteen years imprisonment, see Cr. Code, sub-secs. 355, 358, 359. In such a case it is held by the Court the convict cannot move to quash the conviction nor has he any right of appeal; and if he does move to quash and his motion is refused by a single Judge, there is no right of appeal from his decision. The Court holds that in such cases the Summary Convictions clauses of the Cr. Code do not apply; we presume because it considers a magistrate acting under sec. 777 (5) of the Code as amended by 8-9 Ed. 7, ch. 9, ceases to be an ordinary magistrate, and becomes a Judge from whose decision the only remedy would be by way of appeal, and not by motion to quash, and that the Code had given no right of appeal in such cases.

According to this decision the judgment of a Police Magistrate given under sec. 777 (5) is absolutely final and conclusive, and a man may have to suffer under an erroneous conviction fourteen years imprisonment without any redress, except by appeal to His Majesty in His Privy Council. Whereas if he has a $100 claim in a Division Court he may take an appeal to the Supreme Court of Ontario. It seems to us the case has only to be stated to shew the absolute absurdity of the law on this point and the need for its immediate amendment. As it at present stands, as expounded by the Appellate Division, it seems to involve a very serious blow against the liberty of the subject.

MECHANICS' LIENS—PERCENTAGE TO BE RETAINED BY OWNER.

The construction of section 12 of the Mechanics and Wage-Earners' Lien Act of Ontario has recently been fully considered by Mr. Neville, Official Referee, in the case of *Batts v. Poynte.*

He points out that under the statute the person primarily liable upon any contract, under or by virtue of which a lien may arise, is required to deduct from any payments to be made by him in respect to the contract and retain for a period of thirty days after the completion or abandonment of the contract, 20% of the value of the work, service and materials actually done, placed or furnished as mentioned in section 6, and such value shall be calculated on the basis of the contract price or if there is no specific contract price then on the basis of the actual value of the work, service or materials.

In the case in question the work was abandoned by the contractor; it was under the supervision of an architect who had from time to time issued certificates shewing the value of the work done at $2,312.50. The total contract price of the building was $3,233. The contract contained a clause that the certificates of the architect were not to lessen the total and final responsibility of the contractors nor exempt them from liability to replace work afterwards discovered to have been badly done or not in accordance with the drawings and specifications.

The learned Referee holds that the architect was thus entitled to re-inspect the work and require defects to be made good before issuing the final certificate, and that the contractor not having completed the work, the architect had the right to re-inspect the work actually done, and revise his estimate of its value calculated on the basis of the contract price. Upon the trial the architect placed the value of the work done, calculated on the basis of the contract price, at $2,240.03 instead of $2,312.50.

The Referee finds that this sum $2,240.02 was the value of the work done and material furnished, calculated on the basis of the contract price, and that 20% of this sum should have been retained by the owner, amounting to $448.00, and that the claimants were entitled to a lien upon this sum. He also points out that the cost of completion is generally, and often very

materially, out of proportion to its value compared with the value of the previous work, calculated on the basis of the original contract price. To be a true guide the value of the subsequent work must be calculated on the same basis as the previous work, that is, on the basis of the original contract price, not on the higher basis of cost where done by day labour, or by re-letting the work to a new contractor. It is all a question of proportion and in arriving at the 20% due to lienholders, we must calculate it on the value of the work in proportion to the contract price, without any deductions for damage, or extra cost of completion. We must, in a word, get on to the basis of the original contract as far as we can when the cost of completion is the only evidence we have to go by.

ABANDONING ALLEGIANCE.

The terrible war that is raging over the world to-day has, as we all know too well, created innumerable awkward situations and emphasised existing ones. The need of the hour is man power, and we in this country being anxious to do our share for the Empire, look about for resources in that direction.

The extent of the Dominion and the fact that it includes peoples of varying origins and different ideas as to responsibility of nationhood create difficulties not experienced since the war of 1812. During our war with the United States old Upper Canada passed legislation, which, though not applicable to-day, gives suggestions which may be helpful in meeting present difficulties of a somewhat similar character.

In March, 1814, an Act was passed by the sixth Parliament of Upper Canada, 54 George III., ch. 9, to declare certain persons therein described aliens, and to vest their estates in His Majesty. This was supplemented in 1818 by ch. 12 of 59 George III., an Act for vesting in commissioners the estates of certain traitors and also the estates of persons declared aliens by the Act already referred to. Under the latter Act a commission was appointed which sold the estates of various traitors and aliens, the proceeds being applied towards compensating losses which the King's subjects sustained in consequence of that war after satisfying all debts and claims against such property.

The provisions of these Acts, which doubtless are effete, are

not exactly what would be required at the present time, but something similar should be law now. A number of young Canadians are, to their shame, leaving Canada for the United States to avoid military service. Most of these, if they were compelled to go overseas, when alongside men who from a sense of duty have volunteered for active service, would doubtless make good soldiers; and many of them would, if they saw some of the consequences which would ensue from such desertion of the flag (appropriate laws being enforced), prefer to take up such branch of service as they might best be fitted for. The pains and penalties for such cowardly desertion (or perhaps it would be fairer to say, as to some, such thoughtless desertions and disregard of loyalty and duty), should be the loss of property, if they have any, the declaration that they had lost their British citizenship and were thenceforth aliens, and that they had lost the status which they had in the country. Apparently no action has been taken to prevent this exodus or to keep a record of those who thus decamp.

If the Militia Act had been put in force as an emergency measure at the beginning of the war, as a matter of course, the present situation would not have been so difficult and unmanageable as it is now alleged to be. Some partial enforcement of the Act is spoken of; but this is not what the situation demands so far as the proposal has been outlined. Judging from what has been said in the public press about the enforcement of this Act, there has been apparently, on the part of the government, too much dread of unpleasant results, attributable possibly to supposed policital necessities, and partly to the possibility of a rebellious refusal on the part of a certain section of the Dominion to obey the law when put in force. We do not believe that there would be any such result. A government that does what is right need not fear, for the people who are now roused to a sense of the importance of the measure will not stand any holding back by those who ought gladly to respond to the Empire's call. The somewhat traitorous vaporings of a few self appointed leaders should not be taken seriously. The country, moreover, is in no mood to stand anything in the nature of a treasonable act, and if there are those inclined that way the sooner they are known and promptly dealt with the better.

REVIEW OF CURRENT ENGLISH CASES.

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SHIP—CHARTER-PARTY—CHARTERERS LIABILITY TO CEASE ON SHIPMENT OF CARGO—VARIANCE BETWEEN CHARTER-PARTY AND BILL OF LADING—SHIPOWNERS' LIEN—CAPTAIN TO SIGN BILLS OF LADING IN PRESCRIBED FORM—NO LIEN AS AGAINST BILL OF LADING—LIABILITY OF CHARTERER FOR DELAY AT PORT OF DISCHARGE.

Jenneson v. *Secretary of State for India* (1916) 2 K.B. 702. This was an action by shipowners against the charterer of their vessel for delay in unloading the cargo. The charter party provided that the Captain should sign bills of lading in a prescribed form, without prejudice to the charter-party; that the discharge should be at a specified rate by day, that the Captain should have a lien on the cargo for freight, demurrage, and other lawful claims, against the charterer; and that the charterer's liability should cease on the shipment of the cargo, provided the cargo was worth the freight and demurrage. The captain signed bills of lading in the prescribed form which did not provide for any rate of discharge, not give any lien to the shipowners for freight, demurrage, or other claims. Delay arose in discharging of the cargo, and the action was brought for four days' demurrage. The defendant, the charterer, claimed to be relieved from liability by reason of the cesser of liability clause: but Rowlatt, J., who tried the action, held, adopting the language of Lord Esher, M.R. in *Chick* v. *Radford* (1891) 1 Q.B. 627 and *Hansen* v. *Harrold* (1894) 1 Q.B. 612, that "It cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he stipulated for in another part of the contract," the defence therefore failed.

LANDLORD AND TENANT—OUTBREAK OF WAR—ALIEN ENEMY LESSEE—RENT ACCRUED AFTER WAR DECLARED—SUB-LEASE—COVENANT FOR INDEMNITY—THIRD PARTY NOTICE—JUD. ACT 1873 (36-37 VICT. C. 66) S. 24, S.S. 3—(ONT. RULE 165)—TRADING WITH THE ENEMY ACT (4-5 GEO. V. C. 87) S.1, S.S. 2.

Halsey v. *Lowenfield* (1916) 2 K.B. 707. This was an appeal from the decision of Ridley, J. (1916) 1 K.B. 143 (noted ante, vol. 52, p. 187). The action was aginst an alien enemy to recover

rent due under a lease made prior to the war, the rent having fallen due subsequently to the commencement of the war. The defendant had assigned the lease, and taken a covenant of indemnity from his assignee, against whom he had issued a third party notice claiming indemnity—Ridley, J., held that the action was properly maintainable against the defendant, notwithstanding the war, and that the defendant, as an alien enemy, could not, pending the war, enforce any claim for indemnity. The Court of Appeal (Lord Reading, C.J., Warrington, L.J. and Lush, J.) have now affirmed his decision.

MONEY LENDER—BUSINESS CARRIED ON ELSEWHERE THAN AT REGISTERED ADDRESS—ISOLATED TRANSACTION—PROMISSORY NOTE—BONA FIDE HOLDER FOR VALUE—INDEMNITY AGAINST MONEY LENDER—MONEY LENDERS' ACT, 1900 (63-64 VICT. c. 51) s. 2—(R.S.O. c. 175, s. 11).

Finegold v. *Cornelius* (1916) 2 K.B. 719. This was an action brought by a *bonâ fide* holder for value of a promissory note made by the defendant Cornelius in pursuance of a money lending transaction. Phillips was a money lender, and the defendant applied to him for an advance, and Phillips advanced £200 on the promissory note for £300 which Phillips indorsed to the plaintiff *bonâ fide* for value, and which was the note sued on. The defendant claimed that as the transaction had been carried out at a place which was not Phillips' registered address, the transaction was illegal, and that Phillips (who was made a third party) was liable to indenmify him against the note. Ridley, J., who tried the action, gave effect to this contention, but the Court of Appeal reversed his decision, holding that the transaction was, in the circumstances, a breach of the Act, although it was an isolated transaction; but the Court was divided as to the effect of such a breach. Eady and Banks, L.JJ., holding that it merely subjected Phillips to the penalty for breach of the Act, as provided by s. 2, s.s. 2 (see R.S.O. c. 175, s. 12) but did not render the transaction void; Phillimore, L.J., on the other hand, considered that a breach of the provisions of s. 2 (R.S.O. c. 175, s. 11) also rendered the transaction void.

PRACTICE—COSTS—PAYMENT INTO COURT WITH DENIAL OF LIABILITY—RECOVERY OF SUM LESS THAN PAID INTO COURT—COSTS OF ISSUES FOUND FOR PLAINTIFF—RULE 260.

Davies v. *Edinburgh Life Assurance Co.* (1916) 2 K.B. 852. The English Rule 260 provides that where money is paid into Court

with a denial of liability, if the plaintiff does not accept the money paid in, but proceeds to a trial and recovers less than the amount paid in, he shall not be entitled to the costs of the issue of liability. The present action was brought to recover damages for personal injuries caused by negligence of the defendants. The defendants denied liability, and paid into Court a sum of money in satisfaction, this the plaintiff refused to accept, and proceeded to trial, and established the negligence, but failed to recover as much as the amount paid in; Laurence, J., who tried the action, gave the defendant his costs of the action subsequent to the payment into Court, but the Court of Appeal (Eady, Phillimore and Bankes, L.JJ.) held that there was no jurisdiction under the above mentioned Rule to order the plaintiff to pay the costs of the issue on which he had succeeded, and the order as to costs was modified accordingly.

ALIEN—NATURALIZATION—PRIVY COUNCILLOR — REPEAL BY IMPLICATION—ACT OF SETTLEMENT 1700 (12-13 W. 3, c. 2) s. 3—NATURALIZATION ACT 1870 (33-34 VICT. c. 14) s. 7—BRITISH NATIONALITY AND STATUS OF ALIENS ACT 1914 (4-5 GEORGE V. c. 17) s. 3.

The King v. *Speyer* (1916) 2 K.B. 858. In this case the question was whether a foreigner naturalized under the Naturalization Act 1870 (33-34 Vict. c. 14) was competent to be a Privy Councillor, or whether the prohibitory section of the Act of Settlement (12-13 W. 3, c. 2) s. 3 was still in force. The Divisional Court (1916) 1 K.B. 595 held that the prohibition in the Act of Settlement had been impliedly repealed and therefore that an alien naturalized under the Naturalization Act of 1870 was now competent to be a Privy Councillor, and this decision is now affirmed by the Court of Appeal (Eady, Phillimore and Bankes, L.JJ.).

PHOTOGRAPH—RIGHT TO TAKE PHOTOGRAPHS IN EXHIBITION OPEN TO PUBLIC.

Sports & General Press Agency v. *"Our Dogs" Co.* (1916) 2 K.B. 880. The promoters of a dog show, to which the public were admitted by ticket, purported to assign to the plaintiffs the sole right to take photographs of the exhibits, and this action was brought to restrain the defendants from infringing this alleged right by publishing photographs they had taken at the show of animals exhibited thereat. The tickets of admission

contained no prohibition, nor was the taking of photographs at the show otherwise forbidden. Horridge, J., who tried the action, held that it could not be maintained, inasmuch as the promoters of the show had not in law any exclusive right of photographing anything at the show and therefore could not assign any such right, but that their possession of the land on which the show was held would have entitled them to make their purported assignment effective, by making conditions as to the admission, and stipulating that no one should enter unless he agreed not to make photographs. The action was therefore dismissed.

COMPANY—ARTICLES OF ASSOCIATION—CONSTRUCTION—ELECTION OF DIRECTORS—NOTICE—DAY OF ELECTION—ADJOURNED MEETING—INJUNCTION.

Catesby v. *Burnett* (1916) 2 Ch. 325. This was an action by a shareholder on behalf of himself and all other shareholders of a limited company to restrain the defendants from acting as directors of the company, and the present decision is by Eve, J., on a motion for an interim injunction until the trial. The facts were that the articles of association provided that no one should be elected as director unless written notice of the intention in that behalf was given to the company not less than fourteen clear days before "the day of election" of directors. The ordinary general meeting of the company was held December 10, 1915, at which time the two defendant directors retired by rotation. The report of the directors was not then adopted, and the meeting was adjourned to 10 March, 1916, and a committee of shareholders was appointed to investigate the affairs of the company, and report at the adjourned meeting. On 21 February, 1916, written notice was given to the company by a shareholder, stating that at the adjourned meeting he proposed to move the election of four named directors. On 10 March, 1916, the meeting was held to consider the report and to transact the unfinished business. The chairman ruled the notice of 21 February, 1916, to be out of order, and after declaring the election of auditors, left the chair saying that there was no further business. Subsequently the shareholders appointed a chairman and elected the four persons named in the notice directors of the company. The two former directors having continued to act, the motion was now made to restrain them from so doing until the trial. Eve, J., who heard the motion, granted the injunction holding that the notice

of 21 February, 1916, was a sufficient compliance with the articles, and that the first two persons elected as directors at the adjourned meeting in lieu of the two who retired were validly elected and he granted the injunction as asked.

MORTGAGE—SETTLEMENT OF DEBENTURES—TRANSFER TO TRUSTEE OF SETTLEMENT—NON REGISTRATION OF TRANSFER—NEGLIGENCE OF TRUSTEE—SETTLOR'S SUBSEQUENT EQUITABLE MORTGAGE BY DEPOSIT—PURCHASER FOR VALUE WITHOUT NOTICE—PRIORITIES—QUI PRIOR EST IN TEMPORE POTIOR EST IN JURE.

Coleman v. *London County and Westminster Bank* (1916) 2 Ch. 353. The facts of this case were as follows. In 1893 forty-five debentures of a limited company, secured by a trust deed, were settled by the registered owner upon trust for herself for life, with remainder to her three sons in equal shares, and she executed a deed of transfer of the debentures to Edward Coleman the sole trustee of the settlement, and he had possession of the transfer and debentures, but did not register the transfer in the books of the company. Edward Coleman was also sole trustee of the debenture trust deed. In 1894 one of the sons assigned his share for value to Florence Coleman. In 1911 the settlor who was a director of the company, and in some way then had possession of the forty-five debentures deposited them with the defendants, who were bankers of the company, as security for the company's overdraft, and signed the usual declaration of charge. Before taking the charge the bank ascertained that the settlor was the registered owner of the debentures in the books of the company, and they had no notice of the settlement. The bank two years afterwards gave notice of their charge to Edward Coleman as the trustee of the debenture trust deed which he acknowledged, but made no reference to the settlement. In 1914, after Edward Coleman's death, the defendants first had notice of the settlement, and of the transfer to Edward Coleman, and they at once took a transfer of the forty-five debentures from the settlor, and got an assignment of the interest of two of the sons under the settlement, and were registered as owners in the books of the company. The present action was brought by Florence Coleman, and the executors of Edward Coleman, claiming fifteen of the debentures in priority to the bank. Neville, J., who tried the action, held that neither Edward Coleman's omission to register his transfer, nor his silence when he received notice of the bank's charge,

estopped the plaintiffs from asserting their title, and also that Florence Coleman's assignment, being prior in date to the bank's charge, gave her the better equity and entitled her to priority.

WILL—CONSTRUCTION—"ISSUE"—"PARENT."

In re Timson, Smiles v. *Timson* (1916) 2 Ch. 362. The Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford and Neville, L.J.J) have affirmed the decision of Younger, J. (1916), 1 Ch. 293 (noted ante vol. 52, p. 225).

WILL—CONSTRUCTION—PROVISION AGAINST LAPSE OF LEGACY BY DEATH OF LEGATEE—BEQUEST BY CODICIL.

In re Smith, Prada v. *Vandroy* (1916), 2 Ch. 368. The Court of Appeal (Lord Cozens-Hardy, M.R., Pickford, and Warrington, L.JJ.) have affirmed the judgment of Sargant, J. (1916) 1 Ch. 523 (noted ante vol. 52, p. 312).

WILL—SPECIFIC LEGACIES—SHARES—FREEHOLD MORTGAGES—COSTS OF TRANSFER TO SPECIFIC LEGATEES.

In re Grosvenor, Gosvenor v. *Grosvenor* (1916) 2 Ch. 375. The point decided in this case is simply this: that where an executor assents to specific legacies of shares in a limited company, or of freehold mortgages, the cost of transfers to the specific legatees must be borne by them, and not by the residuary estate.

WILL—RULE AGAINST PERPETUITIES—GIFT OF REALTY TO BACHELOR FOR LIFE—REMAINDER TO ANY WOMAN HE MAY MARRY FOR LIFE—REMAINDER TO CHILDREN OF FIRST LIFE TENANT IN EQUAL SHARES.

In re Garnham, Taylor v. *Baker* (1916) 2 Ch. 413. The will in question in this case devised realty in trust for the testator's son for life, and after his death for any woman whom he should marry, for her life, with remainder in equal shares to the children of his son; and the question was whether or not this disposition infringed the rule against perpetuities. Neville, J., held that as the children entitled in remainder would be ascertained, and their estate would vest, on the death of the first tenant for life, the disposition did not infringe the rule, and was valid. But he held that a trust for sale after the wife's death was void for perpetuity, and did not operate as a conversion. The rule is usually stated as follows: "Where the vesting of an interest in

any property, whether legal or equitable, is postponed for a period exceeding a life or lives in being at the date of the instrument creating it, or (where the disposition is by will) at the death of the testator, and twenty-one years after such life or lives such interest is void." In this case it will be noted that the vesting of no estate is postponed beyond the limits of a life in being at the death of the testator, and twenty-one years after, although the possession of the ultimate remainder might possibly be postponed beyond that period. It nevertheless seems open to question whether this decision is not an invasion of the principle of the rule.

COMPANY—WINDING-UP—"JUST AND EQUITABLE"—COMPANIES ACT, 1908 (8 EDW. 7, c. 69) s. 129—(THE WINDING-UP ACT, R.S.C. c. 144, s. 11 (*e*)).

Re Yenidje Tobacco Co. (1916) 2 Ch 426. This was an application for a winding-up order against a limited company. The company was formed by two persons who were the sole shareholders and directors. The constitution of the company provided that in case of differences arising they should be referred to arbitration, and the award should be entered on the books of the company as a resolution duly passed by the directors. Differences having arisen, they were referred to arbitration, involving an expense of £1,000. One of the parties declined to give effect to the award, and brought an action for fraudulent representation against the other member of the company. The relations between the two became so strained that they refused to speak to each other and communications from one to the other had to be conveyed throught the secretary of the company. The business of the company, notwithstanding the disagreement, was still carried on successfully, and large profits were made. In these circumstances Astbury, J., held that it was "just and equitable" that the winding-up order should be granted, and this decision was affirmed by the Court of Appeal (Lord Cozens-Hardy, M.R. and Pickford and Warrington, L.JJ.).

PRACTICE—COSTS—APPORTIONMENT.

Holloway v. *Cromplin* (1916) 2 Ch. 436. This case, although turning on certain Rules of Court which have not been adopted in Ontario, may nevertheless furnish a guide as to the proper disposition of costs in a like case. Upon the construction of the English Rules in question it was held by Sargant, J., that where

an order is made giving a plaintiff part of the relief asked for, and ordering taxation of his costs of the action, except so far as it relates to specified claims on which he has failed, and ordering taxation of the defendant's costs of those claims, with a direction to set off; the plaintiff is entitled to the general costs of the action, and the defendant is not entitled to have them apportioned.

EASEMENT — WATER — UNDERGROUND PIPE—SEVERANCE OF TWO TENEMENTS—APPURTENANCES — IMPLIED GRANT OF EASEMENT—TWENTY YEARS' ENJOYMENT—JUS TERTII.

Schwann v. *Cotton* (1916) 2 Ch. 459. This was an appeal from the judgment of Astbury, J. (1916) 2 Ch. 120 (noted ante vol. 52, p. 359) and the Court of Appeal (Lord Cozens-Hardy and Pickford and Warrington, L.JJ.) have affirmed his decision.

INDEMNITY—ASSIGNMENT OF AGREEMENT TO INDEMNIFY—AMOUNT RECOVERABLE AS INDEMNITY.

British Union and National Ins. Co. v. *Rawson* (1916) 2 Ch. 476. This was an appeal from the judgment of Astbury, J. (1916) 2 Ch. 152 (noted ante vol. 52, p. 360) and the Court of Appeal (Lord Cozens-Hardy, M.R. and Pickford and Warrington, L.JJ.) have affirmed the decision. This it may be remembered was the case where a married woman debtor not possessed of any separate property, except a contract of indemnity against the debt, assigned this contract to her creditor, and it was contended that the married woman having no property out of which the debt could be levied, therefore the surety could not be compelled to pay anything on his contract of indemnity, but this contention failed both before Astbury, J., and in the Court of Appeal. The Courts holding that the measure of the surety's liability is his principal's liability, and not his capacity to pay.

WILL—CONSTRUCTION—"NEAREST OF KIN OF MYSELF"—ARTIFICIAL FUTURE CLASS.

In re Bulcock, Ingham v. *Ingham* (1916) 2 Ch. 495. This was a summary application for the construction of a will whereby the testator devised certain lands, which, on the death of a tenant for life were limited "to the use of the nearest of kin of myself who shall then be living, and who shall be a male bearing the name of Bulcock, his heirs and assigns for ever, provided nevertheless that such person shall not claim through, or under, my late brother Ambrose Bulcock." At the death of the testator,

and of the tenant for life, all of his next of kin were disqualified either by surname, or descent from Ambrose Bulcock, consequently there were none of the real next of kin qualified to take. But at the death of the tenant for life there were blood relations of the testator alive named Bulcock, being grandsons of paternal uncles of the testator. Peterson, J., who heard the application, held that the effect of the will was to create an artificial class, to consist of persons living at the death of the tenant for life, who were related to the testator, bore the name of Bulcock, and were not descendants of Ambrose, and that of the persons so ascertained, the nearest in blood to the testator were entitled.

CONTRACT—SALE OF ARTICLE BY SUB-CONTRACTOR TO BE ERECTED ON PREMISES OF PURCHASER FROM CONTRACTOR—SUB-CONTRACT—PROPERTY IN INCOMPLETE ARTICLE—LIEN OF SUB-CONTRACTOR FOR PURCHASE MONEY—SALE OF GOODS ACT, 1893 (56-57 VICT. C. 71) S. 18, R.5.

Pritchitt v. *Currie* (1916) 2 Ch. 515. The facts were that Mrs. Currie had contracted with a company, which was a co-defendant, for an electrical installation including, *inter alia*, a storage battery for £1,363. The defendant company then sub-contracted with the plaintiffs to supply and erect the battery on Mrs. Currie's premises. The plaintiffs sent the materials for the battery to the specified station, whence they were carried by the defendant company to Mrs. Currie's premises, but the plaintiffs did not proceed with the erection of the battery, and it was ultimately completed by the defendant company, which subsequently went into liquidation. In pursuance of an order made in the case, Currie paid into Court £269, part of the balance due by her to the defendant company, whereupon proceedings were stayed as against her. And the contest was between the plaintiffs and the defendant company as to which of them was entitled to the money in Court. The *Sale of Goods Act*, s. 18, lays down certain rules for determining the question whether or not the property of goods sold passes to the buyer; and the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.), orerruling Sargant, J., held upon the construction of the sub-contract, that it was not a contract for the sale of a completed article, but of the component parts of the battery, with a supplemental contract that after delivery they should be erected on Currie's premises; that the delivery of the parts was an unconditional appropriation to the contract of goods in a deliverable state within s. 18, r. 5 of the *Sale of Goods Act*,

1893, and that, under that rule, the property therein passed to the defendant company: but (2) assuming the property did not pass, the plaintiffs could have no lien on the money in Court which represented a portion of the price payable to the defendant company under the original contract. Their Lordships intimate a doubt as to the correctness of *Beclamy* v. *Davey*, 1891, 3 Ch. 540.

WILL—REAL ESTATE—DEVISE AFTER DEATH OF TENANT FOR LIFE TO HIS HEIRS AND ASSIGNS—GIFT OVER IN CASE OF DEATH LEAVING, OR NOT LEAVING, ISSUE—DEFEASABILITY RESTRICTED TO DEATH IN LIFETIME OF TENANT FOR LIFE.

In re Brailsford, Holmes v. *Crompton & E. El. Bank* (1916) 2 Ch. 536. The testator, by the will in question in this case, devised lands to trustees in trust for the testator's widow for life, and after the death of his widow he devised the lands to his son "his heirs and assigns" and he further devised the property to his daughter if his son should die without issue, and if he died leaving issue, then he devised it to such issue in equal shares. The question, therefore, which Sargant, J., had to determine was, whether the gift over took effect on the death of the son whenever it might happen, or whether the gift over only took effect in case he should die in the lifetime of the tenant for life, and the learned Judge adopted the latter alternative, being of the opinion that the gift in fee simple was not intended to be reduced, in any event, to a mere life estate, as it would be, if the other alternative were adopted. He therefore held that the gift in fee indicated an intention that the contingency provided for by the testator was the death of the son in the lifetime of the tenant for life, and not his death at any time.

CHARTER-PARTY — EMPLOYMENT FOR CARRIAGE OF OIL AS CHARTERERS SHOULD DIRECT — LIBERTY TO SUB-LET ON ADMIRALTY OR OTHER SERVICE—REQUISITION OF SHIP BY ADMIRALTY—EMPLOYMENT OF FOR TRANSPORT OF TROOPS—EFFECT OF REQUISITION.

Tamplin S.S. Co. v. *Anglo-Mexican P.P. Co.* (1916) A.C. 397. This was an appeal from the decision of the Court of Appeal (1916) 1 K.B. 485 (noted ante, vol. 52, p. 217). The question was whether, on the proper construction of the charter-party, the requisitioning of the vessel by the Admiralty for war purposes put an end to the charter-party. The Courts below held that it did not, and the House of Lords (Lord Buckmaster, L.C., and Lords Loreburn and Parker—Lords Haldane and Atkinson dissenting), have now affirmed the decision.

SLANDER—CAUSE OF ACTION—WORDS IMPUTING MORAL MISCONDUCT TO SCHOOLMASTER—ABSENCE OF SPECIAL DAMAGE—WORDS NOT SPOKEN OF PLAINTIFF IN RELATION TO HIS CALLING.

Jones v. *Jones* (1916) A.C. 481. This was an appeal from the decision of the Court of Appeal (1916) 1 K.B. 351 (noted ante, vol. 52, p. 215). The action was for slander imputing immorality to the plaintiff, who was a schoolmaster. No special damage was proved, nor did it appear that the words were spoken in relation to the plaintiff's calling. The Court below held that, in the absence of the proof of special damage, the action would not lie; and the House of Lords (Lords Haldane, Sumner, Parmoor and Wrenbury) have now affirmed that decision.

NEGLIGENCE—OBSTRUCTION IN HIGHWAY—LEGALIZATION OF OBSTRUCTION BY STATUTE—PUBLIC REGULATIONS AS TO HIGHWAY.

Great Central Ry. v. *Hewlett* (1916) A C. 511. This was an action by a cab driver against a railway company to recover damages for maintaining an obstruction in a public highway, by reason whereof the plaintiff's cab was injured. The obstruction in question consisted of a gate post which was erected without authority, and judicially found to be a nuisance; but, after this decision, the railway company procured an Act of Parliament authorizing them to maintain the post, and it was suffered by the company to remain as originally erected. In consequence of the war regulations as to lights at night, the plaintiff, owing to the want of light while driving his cab, collided with the post, and the cab suffered injury. The jury at the trial found a verdict for the plaintiff and Darling, J., gave judgment in his favour, which was affirmed by the Court of Appeal (Lord Reading, C.J., Warrington, L.J., and Scrutton, J.) but the House of Lords (Lords Parker, Sumner and Wrenbury) unanimously reversed the judgment, holding that after the Act of Parliament the post ceased to be an illegal obstruction of the highway; and that the omission to light the post was not due to the defendants' default, but to the public regulation forbidding its being done, for which the defendants were in no way answerable. We may note that the company forbore to ask for costs, or for the return of the £50 damages, being simply desirous of having their rights and duty defined.

STREET RAILWAY—FRANCHISE—GRANT IN REVERSION—CONFIRMING ACT—DECLARATION IN CONFIRMING ACT AS TO AGREEMENT—STREET RAILWAY ACT (R.S.O. 1887. c. 171) s.18—55 VICT. c. 99 ONT.

Toronto v. *Toronto Railway Co.* (1916) A.C. 542. This was an appeal from the Supreme Court of Ontario. The point in controversy was as to the rights of the Toronto Railway Company in a portion of Yonge Street originally excepted from the franchise granted to the Company, but over which the city had subsequently acquired control. Under the Street Railway Act (R.S.O. 1887, c. 171) the city had power to grant a franchise for a street railway, for a period not exceeding 20 years. In September, 1891, the city made an agreement with the Toronto Railway to grant a franchise for 20 years from that day, and also for a further period of ten years, provided the agreement should be confirmed by the Legislature. The Legislature, by 55 Vict. c. 99 Ont., approved the agreement. At the time of the agreement the city limits extended beyond the Canadian Pacific Railway tracks on Yonge Street 1,320 feet, but on this 1,320 feet the County of York had previously granted to the York Radial Ry. exclusive rights to operate a street railway which was still existing, and this franchise did not expire until 1915. The agreement between the city and the Toronto Railway provided that the company was to have the exclusive right to operate its railway in Toronto, except, *inter alia*, over the 1,320 feet of Yonge Street but that the railway should have exclusive rights on the excepted part, so far as the city could grant the same. In 1915 the franchise of the Radial Railway over the 1,320 feet having expired, the city became entitled to grant a franchise over that part, and the Toronto Railway applied to the Ontario Municipal Railway Board for leave to extend its railway over the same. The Board granted the leave, and the Appellate Division of the Supreme Court of Ontario affirmed the order, and it is from that decision that the present appeal was brought. The main contention on the part of the city was that in 1891 it had no present right to grant a franchise over the 1,320 feet. and that they had no power to grant a franchise to take effect at some future time. The judicial committee of the Privy Council (Lord Buckmaster, L.C., and Lords Loreburn and Shaw) overruled these contentions and dismissed the appeal. Their Lordships held that a declaratory clause in the Confirmatory Act purporting to give the effect of the agreement could not be considered as in any way controlling, modifying, or affecting, the construction of the agreement which it confirmed.

PATENT—CLAIM OF PRINCIPLE—SPECIFICATION OF PRINCIPLE TO BE CLEARLY MADE.

Ridd Milking Machine Co. v. *Simplex Milking Machine Co.* (1916) A.C. 550. This was an appeal from the Court of Appeal of New Zealand. The action was for the alleged infringement of a patent. The plaintiffs claimed that their patent covered not merely apparatus, but a principle. The Court below dismissed the action, on the ground of want of novelty, and the Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Loreburn and Shaw and Sir A. Channell) dismissed the appeal on the ground that where a principle is claimed by a patentee, it must be clearly and specifically claimed in his specification, which had not been done by the appellants.

CANADA—PROVINCIAL TAXATION—ASSESSMENT—DOMINION LANDS —LESSEE OF CROWN—B.N.A. ACT 1867 (30 VICT. c. 3) s. 125.

Smith v. *Vermillion Hills* (1916) A.C. 569. By the B.N.A. Act 1867, s. 125, it is provided that no lands or property belonging to Canada, or any province shall be liable to taxation. The appellant in this case was a lessee of certain Dominion lands, and was assessed under Provincial Statutes of Saskatchewan, in which statutes land is defined as including, for the purposes of the Act, any estate or interest therein. The appellant contended these Acts were *ultra vires*, as being in conflict with the B.N.A. Act, s. 125, and an interference with the Dominion's rights in the land, as the appellant's lease provided that it should not be assigned without leave. The Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw, and Parmoor) affirmed the decision of the Supreme Court of Canada, holding that the Statutes could be read as imposing the tax upon the appellant's interest in the lands, and should be so read, to make them consistent with s. 125 of the B.N.A. Act.

CANADA—LEGISLATIVE AUTHORITY—WORK DECLARED BY STATUTE TO BE FOR GENERAL ADVANTAGE OF CANADA—REPEAL OF ACT—B.N.A. ACT 1867 (30 VICT. c. 3) s. 91 (29), s. 92 (10*e*).

Hamilton Grimsby & B. Ry. Co. v. *Attorney-General for Ontario* (1916) A.C. 583. This was an appeal from the Appellate Division of the Supreme Court of Ontario. The question in controversy was as to the jurisdiction of the Ontario Municipal & Railway Board over a railway in Ontario which had been declared by the

Dominion Parliament for the general advantage of Canada, but which Act had been subsequently repealed except as to such parts of the railway as crossed any Dominion railway. The Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Shaw and Parmoor) affirmed the decision of the Appellate Division, though not for the same reasons as that Court proceeded on. That Court held that the Act relied on as declaring the railway to be one for the general advantage of Canada did not really apply to the railway in question. Whereas the Committee thought that, even if it did, nevertheless its subsequent repeal restored the railway to provincial control.

SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—TIME OF ESSENCE OF CONTRACT—PURCHASER IN DEFAULT—UNDISCHARGED MORTGAGE—VENDOR ALBE TO CONVEY.

Brickles v. *Snell* (1916) A.C. 599. This was an action by a purchaser for specific performance of a contract for the sale of land. It appeared by the evidence that time was of the essence of the contract, and that the plaintiff was in default (although the Judge at the trial found the contrary, and granted specific performance). The Appellate Division of the Supreme Court of Ontario found that the plaintiff was in default, and dismissed the action. The Supreme Court of Canada, though agreeing that the plaintiff was in default, considered that the decision of the Judicial Committee in *Kilmer* v. *British Columbia Orchard Lands*, 1913 A.C. 319, governed the case, and therefore restored the judgment pronounced at the trial. (The Chief Justice, and Anglin, J., dissenting). The Judicial Committee (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw, and Parmoor) distinguished the *Kilmer* case on the ground that there, there was a waiver of the condition as to time, and here there was none. The appeal was consequently allowed, and the judgment of the Appellate Division restored.

RULE OF PROVINCIAL LEGISLATURE—CONTRACT EXTENDING OVER TWO YEARS NOT TO BE BINDING UNTIL APPROVED BY LEGISLATURE—CONTRACT IN CONTRAVENTION OF RULE.

Commercial Cable Co. v. *Newfoundland* (1916) A.C. 610. By a Rule of the House of Assembly of Newfoundland it is provided that in all contracts extending over two years, entered into by the Government of that Colony, there is to be inserted a condition that the contract shall not be binding until it is approved by the House of Assembly. In 1909 the Governor-in-Council

entered into a contract with the appellants extending over 25 years, whereby it agreed that they should have entry, duty free, for all cables etc., necessary for carrying out their operations. The contract did not contain the provision required by the Rule, and was never approved by the Assembly. The Supreme Court of Newfoundland held that the agreement was not binding on the Government, and the Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw and Parmoor) affirmed the decision. Their Lordships, in doing so, held that an Act of the Colony authorizing the Governor-in-Council to remit any duty or toll payable under an Act of the Colony extended only to the remission of duties, or tolls, in a particular case, and not to granting a prospective and continuing exemption.

MUNICIPAL CORPORATION—CONSTRUCTION OF SEWER—INTERFERENCE WITH GAS MAIN—"LAND"—INJURIOUS AFFECTION —ONTARIO MUNICIPAL ACT (R.S.O. 1913, c. 192) s. 321, s. 325 (1).

Toronto v. *Consumers Gas Co.* (1916) A.C. 618. This was an appeal from the Appellate Division of the Supreme Court of Ontario. The appellants, a municipal corporation, constructed a sewer under a street in Toronto, the freehold of which was vested in them. In doing so, it became necessary to lower the respondents' gas main, and the question at issue was, whether or not the corporation was bound to compensate the Gas Company for the expense occasioned to them by this interference. The Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Shaw and Parmoor) agreed with the Court below, that as the word "land" under s. 321 (*b*) of the Municipal Act includes a right or interest in, and an easement over land, the Gas Company was under s. 325 (1) entitled to compensation as for land injuriously affected by the corporation's operations, and the appeal was accordingly dismissed.

PRIZE COURT — JURISDICTION — ABANDONMENT OF VOYAGE— FREIGHT.

The St. Helena (1916) A.C. 625. The facts in this case were that a British vessel before the outbreak of the war shipped a cargo for an American corporation to be delivered to the consignor's order at Hamburg. Before the voyage was completed war broke out with Germany, and the vessel abandoned the voyage, and proceeded to a British port where the cargo was seized as prize, but subsequently released, without any formal order of the Prize Court, to the owners. The cargo being then

in the Manchester Canal Co's. warehouse, the shipowners notified the Canal Company of their claim for freight, and the Canal Company delivered the cargo ot the owners against a deposit of £1,680 to meet the claim for freight. The shipowners then commenced an action claiming to be entitled to be paid freight, but this action was dismissed on the ground that, as the voyage had been abandoned, no freight was payable. The shipowners then applied to the Prize Court for a declaration that they were entitled to some remuneration in lieu of freight for carriage of the goods and Evans, P.P.D., referred it to the registrar and merchants to determine what remuneration the shipowners were entitled to in the circumstances, and it was from this order that the owners of the cargo appealed, claiming that the Prize Court had no jurisdiction to make any such order, and even if he had, it ought not to have been made. The Judicial Committee of the Privy Council (Lords Parker, Sumner, Parmoor, and Wrenbury) were of the opinion that the Prize Court had jurisdiction to determine all incidental matters arising in regard to property seized as Prize, even though it may be released, but on the merits of the case they reversed the order of Evans, P.P.D., on the ground that, the voyage having been abandoned, the shipowners could have no right to freight, or any compensation in lieu of freight, in respect of cargo seized in an English port subsequent to the abandonment of the voyage.

ALBERTA—HUSBAND AND WIFE—MARRIED WOMEN'S RELIEF ACT (ALBERTA 1910 c. 18) s.s. 2, 8, 10.

Drewry v. *Drewry* (1916) A.C. 631. By a statute of the Province of Alberta 1910, c. 18, it is provided that the widow of a testator whose will gives to his widow, in the opinion of the Court, less than she would get if he had died intestate, may apply to the Supreme Court for relief, and on any such application the Court is empowered to make such allowance to the applicant out of her deceased husband's estate disposed of by his will as may seem just and equitable; but it is also provided that any answer or defence that would have been available to the husband in any suit for alimony shall be equally open to his executors or administrators, in any application under the Act. The widow of the deceased testator in this case, had twenty-four years prior to his death, without any legal justification, separated from him, and lived apart from him during the remainder of his life. Notwithstanding this fact, the Courts of Alberta granted the widow relief. The Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw and Parmoor) reversed the decision, holding that in such circumstances the wife could have had no claim to alimony.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Que.] [Oct. 18, 1916.

MONTARVILLE LAND CO. *v.* ECONOMIC REALTY, LIMITED.

Appeal—Jurisdiction—Matter in controversy—Supreme Court Act s. 46 (b) and (c)—Action to remove cloud on title—Discharge of mortgage—Deferment of payment of instalments or of price—Title to land—Future rights.

The judgment appealed from maintained the plaintiff's action brought to obtain an order that it should not be obliged to pay certain deferred instalments of the price of land sold to it by the defendants (appellants) with warranty against all hypothecs, save one for $2,000, until the discharge of certain other incumbrances alleged to be registered as affecting the said lands and for costs of protest, etc., amounting to $33.90. On motion to quash an appeal taken from this judgment to the Supreme Court of Canada:—

Held (Duff, J., taking no part in the judgment), that, as there was no amount in controversy of the sum or value of $2,000, nor any matter in controversy relating to the title to lands or to matters where future rights thereto might be bound, the Supreme Court of Canada had no jurisdiction to entertain the appeal under the provisions of s. 46, s.s. *b* and *c* of the Supreme Court Act, R.S.C. 1906, c. 139. *Carrier* v. *Sirois* (36 Can. S.C.R. 221) applied.

Appeal quashed with costs.

C. Dessaules, K.C., for the motion; *St. Germain*, K.C., *contra*.

Ont.] [Dec. 30, 1916.

CITY OF TORONTO *v.* LAMBERT AND INTERURBAN ELECTRIC RWAY. CO.

Negligence—Electric shock—Action against two defendants—Findings of jury—Joint liability—Agreement between defendants—Right to indemnity.

In an action against two parties claiming from them jointly and severally compensation for the death of plaintiff's son from electric shock caused by negligence of both defendants, may be

held liable if the negligence of each was a real cause of the accident; for either to escape liability it must be proved that the negligence of the other was the sole cause.

By an agreement between the Interurban Electric Co. and the City of Toronto, operating the Hydro-Electric System, the former undertook to "save harmless and indemnify the said corporation . . . against all loss, damages . . . which the corporation may . . . have to pay . . . by reason of any act, default or omission of the company or otherwise howsoever." An employee of the company was killed in course of his employment and in an action by his personal representative the jury found that the city and the company were each guilty of negligence which caused the accident.

Held, that the agreement did not apply to the case of damages which the city would have to pay as a consequence of its own negligence and neither relieved it from liability nor entitled it to indemnity. Judgment of the Appellate Division (36 Ont. L.R. 269), affirmed.

Appeal dismissed with costs.

C. M. Colquhoun, for appellant; *B. N. Davis*, for Lambert; *D. Inglis Grant*, for Interurban Electric Co.

Ont.] [Dec. 30, 1916.

COUNTY OF WENTWORTH *v.* HAMILTON RADIAL ELECTRIC RAILWAY CO. AND CITY OF HAMILTON.

Portion of county road—Railway franchise—Annual payments—Divisibility after annexation—Ontario Railway and Municipal Board—Order for annexation.

In 1902, the County of Wentworth passed a by-law by which an electric railway company was given the privilege of running cars over a county road on paying annually a certain sum for each mile of the operated road. In 1909, territory of the county, including part of said road, was annexed to the City of Hamilton.

Held, that the agreement with the railway company remained in force in respect of the portion of the road so annexed and the county was entitled to the whole of the annual payment as if the annexation had not taken place.

The railway company, by agreement in writing, accepted the said by-law of the county and covenanted with the latter "their successors and assigns" to perform all the conditions thereof.

Held, that the City of Hamilton did not, as a consequence of the annexation of county territory, become the "successor" of the county under said agreement and by-law so as to be entitled to a proportion of the payments to be made by the railway company thereunder.

Judgment of the Appellate Division (35 Ont. L.R. 434), reversed and that of the trial Judge (31 Ont. L.R. 659), restored.

Lynch-Staunton, K.C., and *Counsell*, for the appellants.

Rose, K.C., and *Waddell*, K.C., for the City of Hamilton, respondent.

Leighton McCarthy, K.C., and *Gibson*, for the Hamilton Radial Railway Co., respondents.

Ont.] [Feb. 6.

MACEWAN v. TORONTO GENERAL TRUSTS CORPORATION.

Contract—Consideration—Settlement of action — Statute of Frauds —Trade agreement—Restraint of trade—Criminal Code, sec. 498.

In 1905, M. and his two brothers entered into a contract with R. by which they gave him exclusive control of their salt works with some reservations as to local trade. R. assigned the contract to the Dominion Salt Agency, a partnership consisting of his firm and two salt manufacturing companies, which agency thereafter controlled about ninety per cent. of the output of manufacturers in Canada.

Held, that, as the output was exceeded by the quantity imported which may have competed with it, and as the price was not enhanced by reason of this control by the agency, the contract had not the effect of unduly restraining the trade in salt and did not contravene the provisions of sec. 498 of the Criminal Code.

In 1914, M., as administrator of his father's estate, brought action against the estate of C. who, in his lifetime, had been president of the Dominion Salt Agency and president of and largest shareholder in one of the companies comprising it. This action was based on an alleged agreement by C., in connection with the settlement of a prior action against the three partners in the agency, by which he promised to pay five-sixteenths of the difference between the amount claimed and that paid on settlement. Evidence of the agreement was given by the plaintiff's solicitor in the former action and by defendant's solicitor also.

Held, reversing the judgment of the Appellate Division (36 Ont. L.R. 244), Fitzpatrick, C.J., and Duff, J., dissenting, that the settlement of the action was good consideration for C's contract; that his agreement was not a promise to answer for the

debt of another and did not need to be in writing; that it was sufficiently proved; and that the evidence of the plaintiff's solicitor in the former action was corroborated (R.S.O. 1914, ch. 76, sec. 12), by that of the solicitor for the defendants.

Per Anglin, J.:—The solicitor was not an interested party and corroboration was not required for that reason; if required for any other it was furnished.

The original agreement transferring the salt business to R. was executed by the three brothers "as representing the estate of M., deceased." The action which was settled was brought by the same three persons. After the settlement letters of administration to M's estate were taken out.

Held, that the present action was properly brought in the name of the administrator but, if necessary for defendant's protection, his two brothers might be added as plaintiffs.

Appeal allowed with costs.

Garrow, for appellant. *Weir*, for respondent.

EXCHEQUER COURT.

Audette, J.] [Dec. 30, 1916.

LA COMPAGNIE GENERALE D'ENTREPRISES PUBLIQUES v. THE KING.

Collision—King's ship—The Exchequer Court Act, sec. 20 (c)—"Public work"—Negligence.

Except under special authority the Crown cannot be impleaded in the Courts, nor will an action in tort lie against it.

2. The Crown is not responsible in damages for collision with a King's ship in the absence of any statutory provision therefor.

3. A collision occurred on the River St. Lawrence between Levis and Quebec wherein the suppliant's scow-derrick was injured by a ship belonging to the Crown.

Held, that the suppliant could not recover under sub-sec. (*c*) of sec. 20 of *The Exchequer Court Act* as the accident did not happen on a public work.

A. Marchand, for suppliant.

F. E. Meredith, K.C., and *J. Gosselin*, for respondent.

Audette, J.] JACOB v. THE KING. [January 8.

Death resulting from negligence—Crown's servant—Sub-sec. (f) sec. 20 The Exchequer Court Act—"Upon, in or about."

In the course of a shift of a gang of men fron one bunker to another in the hatchway of a collier, being unloaded by means

of a clam from a crane trestle on a government pier upon which extended spur lines of the Intercolonial Railway, the clam was kept in operation during such shift, and the suppliant was struck by the same and killed.

Held, that the omission to stop the operation of the clam during the shifts "in, on or about," the Intercolonial Railway, was negligence for which the Crown was liable under sub-sec. (*f*) of sec. 20 of *The Exchequer Court Act*.

E. Belleau, K.C., for suppliant. *E. Gelly*, for respondent.

Province of Ontario

SUPREME COURT.

Sutherland, J.] DODDS *v.* HARPER. [32 D.L.R. 22.

Mortgage—Assignment of charge—State of account.

The state of accounts can only affect the assignee of a charge or mortgage under the Land Titles Act, R.S.O. 1914, ch. 126, in so far as payments have been made subsequent to the date of the mortgage; if without actual notice when the assignment is made the assignee is not affected by the fact that the amount for which the mortgage was given has in fact never been paid.

[Land Titles Act, R.S.O. 1914, ch. 126, sec. 54; Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, considered.]

2. *Mortgage—Blanks—Chargee fraudulently named—Bona fide assignee.*

The fact that a mortgagee is fraudulently named in a mortgage executed in blank does not affect the right of a *bonâ fide* assignee to treat the person named as the valid holder of the charge, although in fact the latter had paid nothing to the mortgagor; it is only in so far as payments have been made that an assignee is affected by "the state of the account."

J. E. Jones and *V. H. Hatten*, for plaintiff.

Bradford, K.C., for defendant.

ANNOTATION ON THE ABOVE CASE FROM D.L.R.

The prominent features of this case are as follows:—

1. A document signed in blank.

2. A mortgage or charge, without consideration—no money having been advanced.

3. A receipt for the mortgage money contained in the body of the charge.

4. An assignment of the charge for value to a purchaser, without notice that no money had been advanced.

5. No notice of the assignment to the chargor, and no concurrence by him in the assignment.

6. The defence of purchase for value without notice, not considered in the case.

1. *Document signed in blank.*—At the common law, a document under seal executed in blank is not a deed, and can only be filled up by someone other than the signer upon proper authorization: Armour on Real Property, 2nd ed., p. 332.

There may be some difference of opinion as to whether this principle should be applied to dealings under the Land Titles Act, R.S.O. ch. 126.

By sec. 30 (1). Every registered owner may, in the prescribed manner, charge the land, etc. By sec. 38 (1), he may, in the prescribed manner, transfer the land. The prescribed manner is not defined in the Act. But sec. 69 (1) declares that every transfer or charge signed by a registered owner shall confer a right to be registered. And sec. 102 provides that "notwithstanding the provisions of any statute, or any rule of law, any charge or transfer of land registered under this Act may be duly made by an instrument not under seal," and it is to have the same effect as to stipulations therein as if it were under seal. (It is noticeable that transfers of charges are not included in these provisions, although the custom is to dispense with a seal.) So far as these provisions are concerned, sealing alone is dispensed with. And it might be inferred that the other provisions of law respecting conveyances should apply, were it not for the fact that when a signed transfer or charge is presented to the Master of Titles, the transferee becomes entitled to be registered as owner or chargee under sec. 69, and to receive a certificate of ownership. It seems, therefore, that if the transfer or charge were originally void by reason of its having been signed in blank, it becomes effective by the registration, and enables the transferee or chargee to pass on to his purchaser a good title to the land or charge.

2. *Mortgage without consideration.*—It cannot be doubted that where a mortgage is made for an anticipated advance, and the advance is not made, nothing can be recovered by the mortgagee; and the mortgagor has a clear right to have the instrument delivered up to be cancelled.

3. *Receipt embodied in conveyance.*—By R.S.O. ch. 109, sec. 6, "A receipt for consideration money or securities in the body of a conveyance shall be a sufficient discharge to the person *paying or delivering the same*, without any further receipt being endorsed on the conveyance." The English practice was to ignore the receipt in the body of the conveyance, and, when the purchase money was paid, to endorse a receipt therefor on the conveyance; and absence of such endorsed receipt was constructive notice to a subsequent purchaser that the money had not been paid. This was not the practice in Ontario; but, in any event, this enactment renders a separate receipt for the purchase money unnecessary. But the purchase money must be actually paid or the securities actually delivered. It is difficult to see what, if any, change has been made by this enactment as to the relations between vendor

and purchaser. Equity always allowed a vendor to shew the non-payment of the consideration notwithstanding the receipt. Under this enactment. the receipt is a discharge only if the money has been paid; and it is still open to the vendor to shew, as against his purchaser, that the money has not been paid, notwithstanding the receipt. In other words, as between vendor and purchaser, if the money has been paid the embodied receipt is a discharge to the purchaser; if it has not been paid the enactment does not operate to make the receipt a good discharge.

It is as against a subsequent purchaser only that this section becomes of real importance.

4. *Purchase for value without notice—Embodied receipt.*—By sec. 7 of the same Act it is provided that a receipt in the body of a conveyance "shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof."

The conditions necessary for the application of this section are that there should be a receipt in the conveyance, and no notice to the purchaser that the consideration has not been paid wholly or in part. Under these circumstances the receipt is "sufficient" evidence of the payment of the whole.

"Sufficient evidence" in recitals under the Vendor and Purchaser Act, R.S.O. ch. 122, means *primâ facie* evidence only of the facts recited, because it is qualified by the phrase "except in so far as they are proved to be inaccurate."

Under the present enactment, sufficient evidence is interpreted to mean conclusive evidence.

In *Jones* v. *McGrath*, 16 O.R. 617, such a receipt was held to be conclusive, in favour of a purchaser who had no notice that the consideration mentioned in the deed had not been paid. Ferguson, J., delivering the judgment of a Divisional Court, said (p. 623) that the purchaser is "by law authorized to deal on the footing of that consideration having been paid upon the execution of the conveyance." And he further remarked that, if the receipt was sufficient evidence at the time he was paying away his money, it should not be held to be insufficient evidence in his favour of the same fact at any subsequent time when it is out of his power to regain his former position.

In *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192, a trustee, entitled to sell, executed a conveyance containing a receipt for the purchase money to A., who deposited the deed with the plaintiffs for an advance, without having paid the trustee anything, and the plaintiffs were held to be entitled to rely on the statutory effect of the embodied receipt as proof of payment to the trustee.

Bateman v. *Hunt*, [1904] 2 K.B. 530, was very like the principal case. The defendants applied to a solicitor for a loan, and executed a mortgage containing a receipt to the solicitor's clerk. The full amount of the loan was not advanced. The solicitor's clerk subsequently, at the instance of the solicitor, assigned the mortgage to him, and he made a sub-mortgage thereof to the plaintiff's testator. It was held that the plaintiffs were entitled to

protection under the receipt, which to them was conclusive evidence of the payment of the whole consideration expressed in the original mortgage.

By the interpretation clause of the same Act (R.S.O. ch. 109) the word "conveyance" includes assignment, mortgage, etc.: sec. 2 (*a*), and mortgage includes charge: sec. 2 (*c*).

The effect of this enactment standing alone is therefore to put the assignee of a mortgage in almost the same position as the purchaser of land, where the fact is that none, or some part only, of the consideration has actually been advanced. The assignee is entitled to assume (in the absence of notice to the contrary) that the whole consideration has been paid, and need make no inquiry of the mortgagor or chargor. But he takes subject to the state of the accounts between the mortgagor and mortgagee as to subsequent dealings between them.

5. *No notice of assignment to mortgagor.*—A mortgage or a charge is a chose in action and subject to the enactment relating to the assignment of choses in action. By R.S.O. ch. 109, sec. 49, it is provided that any absolute assignment of a chose in action "of which express notice in writing shall have been given to the debtor" shall be effectual in law to pass and transfer the legal right to such chose in action "from the date of such notice."

It is clear from this enactment that the right to the debt, as distinguished from the title to the land, depends upon the giving of the notice. The title in the assignee is not legally perfect if the notice is not given. No time is fixed or limited for the giving of the notice, except that it must be given before action brought, otherwise the plaintiff's title will not be complete. In *Bateman* v. *Hunt*, [1904] 2 K.B. 530, *supra*, the notice was not given by the sub-mortgagee, but it was given by his executors, the plaintiffs, before action brought, and it was held to be effectual.

In *Pringle* v. *Hutson*, 14 O.W.R. at p. 1085, it is pointed out that the assignee of a mortgage cannot sue without adding the mortgagee if he has not given notice of the assignment to the mortgagor. It does not appear from the report of the principal case whether notice of the assignment was given. But it may be assumed that, if such a notice had been given to the mortgagor, he could have been put on the alert, and that something would have been heard of that at the trial. It may be good policy, however, on the part of the assignee of a mortgage, not to give the notice until his transaction is completed, inasmuch as he is so well protected by the receipt clause. And in any event, the requirement as to notice is no protection to the mortgagor, in a case where the mortgage money is not advanced, because it is not required to be given until after the assignment has been effected.

6. *The defence of purchase for value of a mortgage.*—This point was not dealt with expressly in the case, except in so far as the embodied receipt protected the plaintiff. There is another enactment, the effect of which is problematical, in view of the present case and the authorities upon which it was decided. By R.S.O. ch. 112, sec. 12, it is enacted that "the purchaser in good faith of a mortgage may, to the extent of the mortgage, and *except as against the mortgagor*, set up the defence of purchase for value without notice in the same manner as a purchaser of the mortgaged property might do." Reference may be made to two articles on defence of purchase for

value without notice: 3 C.L.T. 1, by A. H. Marsh, Q.C., and 17 C.L.T. 282, by John S. Ewart, Q.C. Purchase for value without notice was always a defence, and not an instrument of attack. The defendant holding the legal estate was protected, under the circumstances, as against equities, under the maxim, where equities are equal the law will prevail. As between equitable interests only, the defence had no place. Consequently the provision that a mortgagee may set up the defence in the same manner as the purchaser of the mortgaged property (an equitable interest only) is somewhat cryptic. An assignee of an equity of redemption never could have set it up in a Court of Equity, because he had not the legal estate. But attributing full significance to it, as if it stood without this qualification, what is its effect? It is still a defence only. Possibly, matter of form in pleading might be disregarded. But if the defendant in the principal case had counterclaimed for rescission of the charge and assignment, the plaintiff would have been put to her defence of purchase for value without notice. Similarly, if the action had failed for want of notice of the assignment, and after dismissal the defendant had commenced an action for rescission, the plaintiff would have been put upon the same defence. But the obvious answer would have been—that defence cannot be set up against the mortgagor.

The case would now stand thus:—"Conveyance" includes "mortgage," and "mortgage" includes "charge" (R.S.O. ch. 109, sec. 2 (*a*) and (*b*)). Applying these enactments to sec. 7 of the Act, in so far as it applies to the particular case, it would read as follows: "a receipt for consideration money in the body of a charge shall, in favour of a subsequent purchaser of the charge, not having notice that no consideration was paid, be sufficient evidence of the payment of the whole consideration." On the other hand, defence of purchase for value without notice cannot be set up against the mortgagor. And, if the defence of the assignee under the former enactment is in fact the defence of purchase for value without notice, we have here two contradictory enactments. The enactment as to the receipt can only be taken advantage of by a purchaser without notice, but apparently it does not constitute the defence of a purchase for value without notice as formerly understood. And if the assignee relies on it, he need not resort to that defence at all. It seems clear that in order to call for the application of sec. 12 of R.S.O. ch. 112, the mortgagor must be a party to the proceedings; and he must *ex hypothesi* also be an attacking party in order that the defence may be set up. If so, he cannot set up the defence of purchase for value, but he may set up that the embodied receipt is conclusive proof that the mortgagor received the mortgage money.

An assignee of a mortgage might be attacked by another assignee from the same assignor. Or he might be attacked by some other person who had an equitable right to the land, and defend his legal estate to the extent of the mortgagee. In both of these cases he might set up the defence. But, where the mortgagor attacks, the saving of the right to set up the defence against him, is poor satisfaction, if the mortgage contains a receipt for the money.

E. Douglas Armour, K.C.

Province of Manitoba.

KING'S BENCH.

Full Court.] [32 D.L.R. 57.

STUBBS *v.* STANDARD RELIANCE MORTGAGE CO.

Interest—Mortgage—Statement of rate.

The provisions of s. 6 of the Interest Act, R.S.C. 1906, c. 120, are not sufficiently complied with, if a mortgage, under which payments of principal and interest are blended, states the amount of principal and the rate of interest, but does not state whether the interest is calculated yearly or half-yearly. The intention of the Act is that the rate of the interest and how it is computed shall be stated plainly on the face of the mortgage.

Wilson, K.C., *McAlister* and *Garland*, for appellants.

Bergman, for respondent.

ANNOTATION ON THE ABOVE CASE FROM D.L.R.

Three decisions involving an interpretation of the Interest Act (R.S.C. 1906, ch. 120), have been given in Alberta, and one in Manitoba. The decision of Beck, J. (Alberta), in *Canadian Mortgage Investment Co.* v. *Baird*, 30 D.L.R. 275, was in opposition to the opinion expressed in the other three decisions.

The section to be construed reads as follows:

6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

In the *Colonial Investment Co.* v. *Borland*, 6 D.L.R. 211 (1912), the mortgage contained a covenant to pay $600 and interest at 12 per cent. per annum by equal monthly instalments.C Harvey, J. (delivering the judgment of the Court), said: "There is nothing in the covenant to pay the principal and interest at 12 per cent. to suggest that it is in the result the same so far as amount is concerned as the payments under the proviso, and slight computation shews that it is not." It will be noted, therefore, that though the mortgage *stated* the amount of principal and the rate of interest per annum, the Court held that this was not the "statement" required by sec. 6 of the Interest Act. "Moreover," said the Court, "it is not a compliance with the statute, since it provides for interest monthly, and not yearly or half-yearly in ad-

vance." But the Interest Act, sec. 6, does not say that interest shall not be payable except yearly or half-yearly, but merely that it shall contain a statement shewing "the rate of interest, calculated yearly, or half-yearly, not in advance." It is submitted as beyond the possibility of successful dispute that interest calculated yearly or half-yearly may nevertheless be made payable in equal monthly instalments.

In the *Canadian Northern Investment Co.* v. *Cameron*, 32 D.L.R. 54, the mortgage *stated* that the principal was $1,400 and the interest thereon at the rate of 10 per cent. per annum, the blended amounts being made payable in ten half-yearly instalments of $179.90 each. The action was tried by Harvey, C.J. (Alta.), and in the judgment he said: "There is no statement conveying the information the statute demands. Only by a somewhat involved calculation can the rate of interest be determined. The instalments are payable half-yearly, but it by no means follows that the amount is ascertained by calculating it half-yearly. It may, perhaps, be said that the statement does not require to shew that it is calculated not in advance, because the statute prohibits it being calculated in any other way, but inasmuch as interest may be calculated either yearly or half-yearly (that is, the statute permits it), it is necessary for the mortgagor to know which it is. The mortgage fails to comply, both in form and substance, with the conditions of the statute."

The *Canadian Mortgage Investment Co.* v. *Baird*, 30 D.L.R. 275, was tried before Beck, J. (Alta.), and his judgment was given less than one month after the one last mentioned. The mortgage in question contained a clause to the effect that the parties agreed that the principal sum was $1,300, and the rate of interest 10 per cent. per annum. The Judge said: "I think this a sufficient compliance with the Act." He held that no statement in figures indicating the method of calculation was necessary. "Statement," in his opinion, meant no more in the Interest Act than "Statement of claim" meant in the Judicature Act. The words "not in advance" were, he said, merely a prohibition. The purpose of the Act was, he thought, to enable the mortgagor to make his own calculations.

In *Stubbs* v. *Standard Reliance Mortgage Co.* (Man.) *supra*, the mortgage contained precisely the same information as in the action last mentioned, but the Court of Appeal preferred the opinions given by the Alberta Court of Appeal and by Harvey, C.J., both above stated, to that of Beck, J. In delivering the judgment of the Court, Richards, J.A., said: "I think that the intention of the Act is, that there shall be stated plainly, on the face of the mortgage, not only the rate of interest, but how the same is computed, so that the mortgagor shall, when entering into the contract, be informed how the named interest had been calculated (whether yearly or half-yearly) and that he shall afterwards, if he be able, check over the amounts and see how he stands."

This last decision goes nearer than any other to expressing distinctly what seems to have been the feeling of all the Judges except Beck, J., as to the purpose of the Act. It seems to mean that in a mortgage providing for periodical payments of blended amounts, there shall be a calculation in figures shewing how each amount is constituted, by distinguishing principal and interest, and stating that the interest is calculated yearly or half-yearly, as

the case may be, at a named rate. No other method would enable an illiterate or inexperienced man to do what the mortgagor, it is said, should be enabled to do.

But the purpose of a section of the Act must be gathered from its words, if they can be construed precisely, and, if not, they should be given a sense which, though not correct grammatically, is in harmony with the whole Act. If the words of the section admit of more than one construction, the true meaning is to be sought in the context, but the language must not be strained on account of the supposed intention of the legislature. (Maxwell on Statutes). Let us then examine the words of sec. 6 with their context. They deal with mortgages on real estate under which payments of principal and interest are blended. It is provided that the mortgage shall contain a statement shewing the rate of interest chargeable thereon, but no restriction as to the rate which may be charged, and though the rate shewn must be "*calculated*" "yearly or half-yearly," it is not said that the payments shall not be weekly, monthly, or otherwise.

"No interest whatever shall be chargeable unless the mortgage contains a statement shewing the rate of interest, calculated yearly or half-yearly, not in advance."

Beck, J., held that the mortgage need not shew that the interest was not calculated in advance, since "not in advance" were merely prohibitory words, and need not contain figures shewing the rate of interest, and that it was calculated yearly or half-yearly, since, in his opinion, a covenant to pay a named rate yearly or half-yearly was a "statement" in the sense that word is used in "statement of claim," etc. But upon critical examination it appears that the word "statement" cannot be construed in that detached way; it must be "a statement shewing the rate *calculated* yearly or half-yearly;" *not* the rate at which it was calculated, but the calculation itself.

In sec. 4, dealing with mortgages not on real estate, it is provided that if the contract does not contain "an express statement of the yearly rate or percentage of interest," certain consequences shall follow. This is the kind of a statement that Beck, J., thinks sec. 6 aims at, which it clearly is not, for, by the very words of section 4, mortgages on real estate are excepted. A statement of a yearly or half-yearly rate is a different matter then from a "statement shewing a rate *calculated.*"

It is submitted, therefore, to be the better opinion that mortgages on real estate under which payments of principal and interest are blended should contain a detailed statement in figures shewing how each payment to be made thereunder is made up, distinguishing principal and interest, and shewing that a named rate is charged yearly or half-yearly.

The fact that so much uncertainty admittedly exists about a matter of frequent occurrence and great importance is a reflection upon the draftsmanship of sec. 6. Indeed, the whole Interest Act could be improved easily in its construction.

Book Reviews.

Mounted Police Life in Canada A record of thirty-one years' service. By CAPTAIN R. BURTON DEANE. Cassell & Co., Ltd., London, New York Toronto and Melbourne. 1916.

This is the first attempt so far as we know to give a view of the North West Mounted Police from the inside and no one better qualified for the task could undertake it than the author.

The history of this force is replete with romantic incidents, records of devoted service, soldierly discipline and heroic deeds. The North West Mounted Police have played a striking part in the orderly development of that portion of our Dominion where its services were required. As a factor in the administration of justice it has been both paternal and fraternal—a wise parent as well to unruly white men as to the wayward and uneducated Indians when called upon to control, to punish and to protect, and a brother to those in trouble and in need of advice.

Stories many have been told of the fearlessness of the brave men who seemed naturally to drift into such a service; and who therein exemplified the dominance and the innate love of law and order, justice and fair play which has made our great Anglo-Celtic race the best and most successful colonising people the world has ever seen. As an illustration, it is known that one policeman has travelled many miles over the pathless prairies to an Indian Reservation, and there, single-handed, arrested an Indian accused of some serious crime, perhaps, murder; no resistance being attempted, for the accused knew not only that the policeman was the best man of the two, but he and his friends also knew that escape was not worth he risk, and that at the back of this lonely but fearless determined man was England's justice: If guilty he knew he would be punished, hanged if that should be the sentence, but if innocent that he would be returned safely to his people.

The writer, when travelling through Dakota, Montana and Idaho some years ago, met many of the officers of the United States army stationed there and they all expressed the greatest admiration for the Canadian force and the results obtained; comparing it with the methods of their Government which left their Indians to the tender mercies of unscrupulous agents and sutlers whose frequent ill treatment and cheating of the Indians often led to reprisals and bloodshed.

The book before us begins with a sketch of the author's life at the various posts where he was stationed, interwoven with many stories of prominent men with whom he was brought in contact, and incidents telling of the nature and hardships of the service of this splendid body of men. The later chapters are the most interesting to lawyers, giving as they do records of numerous criminal trials which Captain Deane was called upon to manage, and, in connection with them, to hunt up and arrest offenders, to collect evidence and often to instruct magistrates as to their duties. These interesting and picturesque chapters make most interesting reading.

The Journal of the Society of Comparative Legislation, edited by SIR JOHN MACDONNEL, K.C.B., LL.D., F.R.A., and EDWARD MANSON. New Series, vol. 16. London. John Murray, Albamoral St., W. 1916.

The contents of this series are varied and interesting, covering a great variety of subjects, giving a bird's-eye view of much that is going on of legal interest in British jurisprudence throughout the Empire.

War Notes.

On the 1st instant the Huns began the threatened intensified ruthless submarine war. All ships within a certain area to be sunk without warning, whether neutral or belligerent. All pledges as to submarine warfare are cancelled. One American ship only to be permitted to sail once a week to and from England and such ship not to be molested if it goes on a described course and to a named port.

On the 5th instant the President of the United States severed diplomatic relations with Germany and instructed Mr. Gerard to leave Berlin and handed Count Von Bernstorff his passports.

We have remarked before now that the legal profession has sent more men to the front in proportion to its numbers than any other class of citizens. This is well illustrated by a report from the Calgary Bar Association. At the outbreak of the war the

Association had a membership of 126 duly qualified lawyers practising in Calgary. Of these 30 have gone to the front, some of them never to return. In addition to the Bar 30 law students from the Calgary offices have also joined the ranks. The record of Western Canada is splendid. When we compare this with a certain province in Eastern Canada one naturally asks the reason why one province shirks its responsibility as a component part of the Dominion, and lets the other eight provinces protect them, their wives and their children. There must be a reckoning for this some day. In the meantime why should not the Government enforce the Militia Act of Canada, and put all parts of the Dominion on the same footing so far as military service is concerned?

Bench and Bar.

Law Society of Alberta.

The proceedings of the sixth general meeting of the Bar, held at Edmonton, under the auspices of this society, in December last, was one of great interest to the profession of Alberta, and several of the matters discussed had also an interest for members of the profession in other provinces. We regret that want of space prevents our giving an extended report of what was done and said. We can only refer to a few of them:—

A report was presented of the committee on the evils of a patronage system which resulted in a resolution to the effect that the efficient administration of justice would be promoted by the appointment of an independent commission to make appointments to the land titles and other legal offices of the province. We have frequently referred to the objectionable practice of appointing ignorant laymen to positions which, certainly for the benefit of the public, should be occupied by members of the profession. Another resolution seeks to prevent unlicensed conveyancers and agents from doing business which properly comes within the province of lawyers. Other matters discussed were: Costs in probate and administration matters, mode of election of Benchers, etc.

At a meeting of the Benchers held in January last, James Muir, K.C., LL.D., was elected President, and Mr. C. F. Conybeare, K.C., D.C.L., Vice-President; Mr. Charles F. Adams being Secretary.

It was reported that the following members of the profession were killed in action or died of wounds during the last half-year: George Thorold Davidson, Medicine Hat; Norman Murray, Vermillion; and Horace A. Dickey, Edmonton; and E. F. J. V. Pinkham, Frank P. Oldroyd, Joshua S. Wright, Harry H. Dinning, students. One hundred practitioners were reported as having enlisted for active service.

Sir Henry Bargrave Deane, of the Probate, Divorce and Admiralty Division of the Supreme Court of Judicature in England, has retired from the Bench owing to ill health. He was a distinguished counsel in divorce, ecclesiastical and probate causes before his appointment. It is said that his distinguished appearance and courtesy of manner were a great asset in maintaining the dignity of his Court. He is succeeded by Sir Maurice Hill, a successful practitioner in the Commercial Court, and also well known in artistic and scientific circles.

Flotsam and Jetsam.

TURNER v. COATES.
(115 L.J. 766).

Good farmer Coates a colt once had of quite a tender age,
It frisk'd about as colts will do, for colts are not quite sage
A walk, he thought, his colt should take all in the summer air
And for to lead its infant steps he got a good old mare,
And Bunce, a boy, to guide them right, he also did procure,
And in the darkness of the night he thought they'd be secure.

Behold the trio now do start upon their darksome way
Young Bunce with care the mare did lead—. The colt behind did stay;
And as he ambled in the dark a brilliant light appeared
Which terror struck into his heart and made him most afeared.
And when Miss Turner, on her bike, approached the startled colt—
He straightway kicked her off her wheel, and then away did bolt.

To justice then away went she and asked that farmer Coates
Should, for the damage thus sustained, shell out some golden oats.
The Judge looked wise and stroked his beard, and said "I do declare
The damage that your colt has done, now Coates you must repair!"
And thus said Lush & Bailhache, JJ., who on the case did sit,
"Coates, for his want of care, is bound to pay the maid a bit."

G.S.H.

The Morality of the Advocate.

Some discussion in the public press has followed the publication of Mr. Purcell's Reminiscences, which we noted last week. Mr. Purcell has frankly confessed that he did his best to win his cases by every honest means which legal etiquette permits to the advocate, and that in many cases he succeeded in securing a favourable verdict for accused persons of whose guilt he himself felt little doubt; although, at the same time, he mentions the fact, also recorded by Serjeant Ballantine as his experience of prisoners, that not one of his clients has ever admitted to him that he was guilty. Naturally to the lay critic this suggests the old accusation, against advocates, that they help to pervert justice by securing the escape of the guilty or the punishment of the innocent. We do not think that the latter often happens nowadays. The tradition that prosecuting counsel should act fairly, recently endorsed emphatically by the Court of Criminal Appeal, is a strong one at the English Bar, and offences against it are rare. We cannot say that no breach of this honourable tradition ever occurs, for now and then—usually in a private prosecution—a zealous counsel, too eager for triumph, allows himself to ride for a verdict of guilty. But such cases are rare and are universally condemned by the public opinion of the Bar. They would probably be eliminated altogether if private prosecutions were abolished, as is practically the case in Scotland, and if the practice of granting out Treasury briefs on circuit to counsel whose qualifications are derived from political work rather than the extent of their legal practice was finally abandoned. But the case of defences is different. Here an advocate always will do his best to win the case for his client by every proper means, and it would be prudery to deny that in practice the normal advocate does so. If he did not, clients—whether innocent or guilty—would seek a less pedantic and more enthusiastic advocate.—*Solicitors' Journal.*

Changes in the Mode of Conducting Criminal Trials.

Englishmen read with pleasure the unstinted praise which Americans bestow on the conduct of criminal trials in this country. This praise is particularly directed to the large powers exercised by the presiding Judge and to the confidence of the Bar that these powers will be exercised with fairness and impartiality. But if we are to accept the statement of the late Mr. E. D. Purcell, in his recently published work, "Forty Years at the Criminal Bar,"

there was a time within living memory in which the excellence of our criminal procedure was by no means conspicuous. Mr. Purcell tells us that his early experiences of a trial conveyed the idea that it was a formal preliminary to passing sentence upon the accused, who had the effrontery to plead not guilty. No doubt was entertained of his guilt, but it was necessary to make the jury realise it, and their untrained minds required guidance. The prisoner's counsel, often treated with scant courtesy and little consideration, was endeavouring to defeat justice, and his endeavour must be promptly checked; any point that he might make in the accused's favour must instantly have its baselessness exposed. Sir Peter Edlin, who was Judge in the metropolitan county Courts for more than twenty years, is said to have regarded an acquittal as a personal insult, and to have been in the habit of interposing to displace anything favouring the defence which had been elicited in the cross-examination. At the present day, we are assured, while there is much less difficulty in obtaining an acquittal, there is much more difficulty in obtaining a conviction. This improvement in the administration of criminal justice would seem to be due to the influence of particular Judges rather than to differences in the course of business at assizes and sessions. Americans who are interested in the reform of criminal procedure may be encouraged by the fact that in nearly all the States the bench is respectable in point of character and is occasionally adorned by men of the highest eminence.—*Solicitors' Journal.*

A good story is current at Osgoode Hall in reference to the late Chancellor Boyd's handwriting, which, as all who are familiar with it, know was of a peculiarly crabbed character, and generally illegible to any but experts in calligraphy, it is this:—A party of Judges were at luncheon one day when the conversation turned on the subject of handwriting, and that of the Chancellor not unnaturally came up for rather free criticism. The Chancellor, who was present, remarked that it would probably surprise his critics to know that he had once taken a prize for handwriting, whereupon the late Mr. Justice Ferguson replied that he thought that it must have been for Arabic. Those who are familiar with Arabic and the late Chancellor's writing will appreciate the appropriateness of the remark. The curious twists and turns in which the late Chancellor's writing abounded have puzzled many a reader, but there was at least one official at Osgoode Hall who

was rarely if ever "stuck" by them; and as to him we may remark that he thought his writing was "copperplate." Printers, however, as we happen to know, at least stuck when his writing appeared and said life was not long enough in these strenuous days to decipher it, and they accordingly insisted that his "copy" should be typewritten.

Circumstantial Evidence.

The weakness of circumstantial evidence, and the danger of presuming guilt upon this class of evidence alone, is well exemplified by a case referred to in the *Solicitors' Journal* as follows:—

At a recent inquest at Croyden upon the body of a young woman who appeared to have been killed by a fall from a railway train in which she was a passenger, the glass in one compartment was broken, and soldiers in the adjoining compartment had heard screams and the breaking of glass before the train arrived at its destination. Attention was naturally directed to a man named Batty, who was the only other passenger in the compartment in which the deceased travelled, and although there was not the slightest evidence that he had offered her any violence, or that she had been in any struggle between them, there are unfortunately many unthinking persons who are ready to form unfavourable suspicions without any evidence to support them. Such persons are capable of believing that the fact that Batty was the last person seen with the deceased was enough to charge him with having behaved towards her in such a manner that she was alarmed and fell from the carriage while attempting to escape from it. But the evidence of Batty, delivered in the most straightforward manner, and that of the doctor who had attended him, quickly dispelled any mystery which hung about the case. Batty suffered from epileptic fits, and his contortions during one of these fits which had attacked him while in the compartment were calculated to terrify the deceased and cause her to force the door and to endeavour to escape from the carriage. The coroner and jury were satisfied with this evidence and there was a verdict of death from an accidental fall. One is reminded that in the year 1699, Mr. Spencer Cowper, a rising barrister on the Home Circuit, who was afterwards raised to the Bench, was most unjustly put on his trial for the murder of Miss Sarah Stout without any evidence to support the charge apart from the circumstance that he was the last person in her company.

Canada Law Journal.

VOL. LIII. TORONTO, MARCH, 1917. No 3

THE AWAKENING OF RUSSIA.

One of the most interesting and remarkable events in modern history is the almost bloodless revolution which has just taken place at Petrograd. On the 15th of March the Czar Alexander II., Emperor of all the Russias, under pressure from the Duma, representing the people of that great country, abdicated his throne for himself and for his young son.

That which it took England centuries and so many wars to accomplish: that which cost so much to the United States of Amer ca in the two great wars of its history: that which deluged France with blood at the time of the French Revolution, has been accomplished, in a country of vastly greater extent and more populous, in the course of a few hours. The same mail which brought the news of the end of the old Empire brought the news of Russia's birth to a government "of the people, by the people and for the people." Whether the new Government will take the shape of a limited monarchy or of a republic remains to be seen. We trust it will be the former, and we say this because recent experiences of our cousins to the south of us clearly indicate that a limited constitutional monarchy, such as that of Great Britain, responds more rapidly to the will of the people and is much more satisfactory in many respects than that which came into existence under the Declaration of Independence.

It would seem from later reports that there is a growing feeling in Russia that the family which ruled and reigned in Russia for so many centuries is not to be trusted so long as there is the possibility of sinister intrigues by Germany or by the pro-Germans of the Baltic Provinces. This remarkable change in the government in a country so great in territory and population as Russia

is the more remarkable by reason of the calm, good-natured manner in which it was accomplished—no riot and no bloodshed. This is surely indicative of a people of a strong, steady, peace-loving character, as well as of great intelligence, perhaps born of the persecution they have endured, and which augurs well for their future national life.

FORFEITURE UNDER CONTRACTS FOR SALE OF LANDS.

This subject is constantly arising and is constantly giving trouble. The purpose of this article is to again discuss it, and the excuse for doing so is the appearance of some recent decisions in the House of Lords and Privy Council.

The point usually arises where the purchaser having agreed to buy lands and having paid some of his purchase money fails to pay the rest and the vendor tries to keep what money he has received, and also to retain or resell the land. The problem of course, assumes innumerable forms, according to the circumstances of each case, and the terms of each particular contract, but perhaps a consideration of some elementary propositions of law may help us to deduce a few working principles.

The first point to consider is the interest which the purchaser takes under an agreement to sell to him. This has been variously stated:—

(1) There is of course the contractual right entitling him at law to sue for damages if he has done his part and the vendor has defaulted. This is purely a right *in personam* and before the fusion of the Courts, he might have brought his action in the Common Law Courts.

(2) There is the right to sue in Chancery for specific performance. This too is a right *in personam* but the Chancellor could have put the vendor in gaol if he did not obey the Court's decree and convey to the purchaser. Thus the purchaser got the land but by a proceeding which made not so much a claim to an estate in the land as a demand that the vendor should convey to him or be guilty of a contempt of Court.

(3) There was, thirdly, the interest which the purchaser claims in the land which he had agreed to buy. In this aspect the claim is *in rem* rather than *in personam* and it is the true object of the action for specific performance, even if the form of that action is an appeal to the Court to coerce the defendant. What this interest is has caused some difficulty. Mr. Armour contends that "the equitable right of a purchaser to enforce a contract is not 'property' and is not the subject of a sale under execution"; Armour on Titles 181, and in *Re Flatt*, 18 A.R. 1, a majority of the Court of Appeal declined to hold that a purchaser in possession of a freehold estate under a contract of sale was a "freeholder" so that he might petition as a ratepayer. This case, however, deserves to be read with the recent decision of *Allen* v. *Inland Revenue Commissioners* (1914) 1 K.B. 327, 2 K.B. 327, which rather supports the dissenting view of Maclennan, J.A. The difficulty of determining the true nature of the purchaser's interest in the land is accentuated by the judgments in *Robinson* v. *Moffatt*, 37 O.L.R. 52; see particularly p. 55. Generally it is said that there is an implied trust in favour of the purchaser; Williams Real Property, 21st ed., 183, Sugden on Vendors, 14th ed., 175, and this is the result of the judgment of the House of Lords in *Rose* v. *Watson*, 10 H.L.C. 672 though, this term has given trouble as one hardly associates a vendor who has not received his money and has not conveyed with the unfortunate individual who being seized of lands in trust for others has only obligations and liabilities to remind him of his dignity as a land owner. The difficulties which this term creates when applied to a vendor are brought out clearly in the cases cited in *Re Flatt*, at pages 16 and 17, and they lead Mr. Justice Osler to say, at page 17, "that the interest of the purchaser until he is entitled to call for the conveyance is properly an equity or equitable right rather than an equitable estate". These anomalies are recognized also by Jessel, M.R., in *Lysaght* v. *Edwards*, 2 Ch. D. 499, at p. 506, where he speaks of the vendor as a "constructive trustee" for the purchaser and after stating that it has been settled since the time of Lord Hardwicke that the vendor is a trustee immediately on the execution of valid

contract (p. 506), he then describes him as something between a naked or bare trustee or a mere trustee and a mortgagee. This will serve to illustrate the difficulty in defining exactly what interest the purchaser has in the lands, but it makes it abundantly clear that he has some interest and that his rights are not merely *in personam*. Perhaps we can better understand the existence of such a right *in rem* if we recall the sense in which the word "trust" was originally employed. To a lawyer on the common law side, it originally had no legal effect upon an estate. There was only the seisin and the enquiry always was how had the owner of the seisin affected it by his dealings with the land. Any "trust" created was a mere moral obligation afterwards enforceable in equity but unknown at common law. It was a term apparently wide enough to include a "use" which was one form of "trust." For instance, "A use is a trust or confidence which is not issuing out of lands but as a thing collateral annexed in privity to the estate"; 1 Co. R. 121*b*, or "where the trust is not special or transitory but general and permanent there is a use," and "a trust was the way to a use"; Bacon on Uses, p. 9. To the common lawyer all such trusts were not estates or interests in land, and they were not by any means popular. Sir Edward Coke says "there were two inventors of uses, fear and fraud," *ibid*, and the Statute of Uses speaks of them as "divers and sundry imaginations, subtle inventions and practices." These "subtle inventions and practices," however, under the general name of trusts, fastened themselves upon English land and it would be hopeless now to contend that the use which is only one form of trust in this general sense is not an equitable estate. Some of the earlier cases seem to bear out this suggestion. In *Davie* v. *Beardman* (1662), 2 Ch. Cas. 39, we are told that the vendor stood "trusted" for the purchaser and perhaps we can now more readily understand the rule laid down by Lord Hardwicke in 1738, and since undoubtedly followed, "that the vendor of the estate is from the time of his contract considered as a trustee for the purchaser and the vendee as to the money a trustee for the vendor"; *Green* v. *Smith*, 1 Atk. 572. If we concede that a trust was not only an obligation imposed on the trustee but a right vested in the *cestui que* trust

one variety it will help us to realize that the purchaser's interest and enforceable in equity against the land, of which the use is confers in equity a property in the land itself. Whether the vendor is an implied trustee, a constructive trustee, a bare or naked or mere trustee is not of much importance. These terms were probably unknown when the trust was first given recognition in Chancery and the important thing is that the vendor stands "trusted" for the purchaser and thereby the purchaser has an equitable interest in the land. In fact, the vendor's position is hardly that of an implied trustee. He has agreed to convey to the purchaser and his duty is express and not implicit. He is really an express trustee.

Conceding, therefore, that the purchaser acquires an equitable interest in the lands on making a binding contract one naturally asks what happens to this interest if the contract is not carried out.

If the purchaser breaks his contract the effect upon his estate is necessarily different from cases where the vendor is the defaulter. The latter is the simpler problem. The purchaser may forego his equitable interest in the lands and sue for damages, or he may claim his equitable interest and sue for specific performance. If the vendor has not only refused to convey to the purchaser but has conveyed to someone else who is protected by the Registry Act or by the doctrines of equity in favour of innocent purchasers who acquire the legal estate then the equitable interest is gone and damages are the only remedy. Where, however, the purchaser is a defaulter the problem is not so simple and many questions arise. The following are suggested:—

1. The purchaser being in default asks an extension of time. Can he get it?

2. The purchaser having paid a deposit makes default. Can the vendor cancel the sale and keep the deposit?

3. The purchaser having paid certain instalments of purchase money makes default. Can the vendor cancel the sale and keep the instalments?

These questions are to some extent merely a statement in

different ways of the same problem, but they afford a convenient method of dealing with somewhat different classes of decisions.

1. *The purchaser being in default asks an extension of time.* This point is continually arising during the period between the execution of the agreement and its completion by conveyance. Most agreements contemplate at least three stages, the service of requisitions, the service of answers and the time for closing. Dates are usually fixed for each and if the vendor or purchaser does not do his part in time then he breaks his contract and at common law he cannot enforce a contract which is not divisible if he has broken it and if the Court should extend the time for him against the will of the other party it would create a different obligation, generally spoken of as making a new contract, though this is hardly correct, as a contract is a mutual agreement, while anything forced upon an unwilling party is not a contract, whatever other kind of obligation it might be. Therefore, at common law, a contract of sale broken as to dates as in any other particular cannot be invoked by a defaulter for the purpose of obtaining common law relief. In equity, however, these severely logical considerations did not always prevail. The Chancellor not only invented and applied the remedy of specific performance, but did so even though the plaintiff had broken his contract as to dates and so we find that parties who buy and sell lands have been compelled to carry out an arrangement different from that stipulated for because it called for completion at a different time. Our law has often created anomalies if they assist fair dealing, so this was cheerfully though somewhat ironically called "specific performance" of a contract. The reason for this indulgence was stated by Lord Eldon as follows:—"As to the contract of the party the slightest objection is an answer at law. But the title to an estate requires so much clearing and enquiry that unless substantial objections appear not merely as to the time but an alteration of circumstances affecting the value of the thing . . . many of the cases go the length of establishing that the objection cannot be maintained"; *Seton* v. *Slade*, 7 Ves. 265, p. 274. The rule is carefully stated by that most cautious Judge but it makes it clear that owing to the complexity of English titles, the Courts

of Chancery will not deprive a purchaser of his equitable estate merely on account of delay nor will it deprive a vendor of his right to the money for this reason alone. Titles being so much older and more complicated in England than here one might wonder whether the rule would apply equally to sales of land in Ontario. The point was, in fact, considered soon after the establishment of Courts of Chancery in Ontario in *McDonald* v. *Elder* (1850) 1 Gr. 513 at p. 522 *et seq.* and *O'Keefe* v. *Taylor* (1857) 2 Gr. 95, and the Court concluded that the equitable rule ought to be introduced and if anything extended in Ontario not because of the complexity of titles but because of the greater frequency of sales here, the fact that many purchasers took possession under contracts, and deeds were not obtained till later and because of the general looseness of land transactions. These considerations hardly apply with the same force now but there can be no doubt that the equitable rule remains here; see *Foster* v. *Anderson*, 15 O.L.R. 362, 16 O.L.R. 565, 42 S.C.R. 251. It is no harm to point out that the Judicature Act (1881), expressly preserved the equitable rule, though curiously enough the statute is seldom referred to in the cases. It now forms part of the Mercantile Law Amendment Act, R.S.O. c. 133 s. 15.

Concluding, therefore, as we must that a purchaser does not always lose his equitable title to lands because of his delay the next point to consider is whether there are any limits to the indulgence granted by the Court of Chancery. In discussing this question we may properly omit as irrelevant all questions arising out of waiver by the opposite party. It is no doubt true that the provisions as to time may be waived expressly or by conduct, but where there is an extension of time on this account it is referable not to any indulgence granted by the Court but to the fact that the parties have made a different bargain.

In the argument in *Seton* v. *Slade*, 7 Ves. 265, it is suggested (quoting from counsel appearing in an earlier case), that if the indulgence granted in equity was not to be applicable as to dates to all land sales it would be necessary to insert in contracts a provision that time should be strictly observed notwithstanding decisions of the Court to the contrary. This formula was not

followed in practice but the Chancellor refers to cases in which time might be made the "essence of the contract" and it is this expression which has frequently rendered innocuous the equitable penchant for extending time; *Hipwell* v. *Knight*, 1 Y. & C. Exch. 401, *Parkin* v. *Thorold*, 16 Beav. 59, 65.

Though it may be said that there is no magic in these particular words and others will do as well (*Hudson* v. *Bertram*, 3 Madd. 440, *Hudson* v. *Temple*, 29 Beav. 536), yet they have been very generally employed and are so usual in contracts of sale that one might almost say as was said of the Statute of Uses that the only result of the equitable rule as to time has been to add a few words to agreements for sale.

Where the words occurred, they were looked at askance by the Chancellors. They sought to annul the settled policy of Courts of Equity and were strictly construed; *Hudson* v. *Temple*, 29 Beav. 536 at p. 543, *Wells* v. *Maxwell*, 32 Beav. 408 at p. 414, and due to this policy a subtle distinction prevailed for a short time in Ontario cases, very frequently occurring where the contract was in the form of an offer giving a few days for acceptance and stipulating that time should be "of the essence of this offer." It was at first thought that the only matter covered by these words was the acceptance of the offer in time; *Bowerman* v. *Fraser* (1907) 10 O.W.R. 229, and *Crabbe* v. *Little* (1907) 14 O.L.R. 631 at p. 636, and the rule was followed by the late Chancellor in *Foster* v. *Anderson*, 15 O.L.R. 363 at p. 370, but on appeal, 16 O.L.R. 565, a different construction of the wording of the document was made and the Judges were less concerned about questions of strict or liberal construction than about what was the meaning of the actual words used by the parties. The decision of the Court of Appeal was affirmed by the Supreme Court in 42 S.C.R. 251. It should be observed, however, that Mr. Justice Anglin, in *Bark-Fong* v. *Cooper*, 49 S.C.R. 14 at p. 30, again restricts these words to the clause in which they appear although it was the last clause and the provision was that "time shall be of the essence of this *agreement*". *Foster* v. *Anderson* was not cited. It is not necessary, however, that there should always be an express stipulation making time of the essence of the contract. Notwithstanding the

alleged rule of strict construction referred to in the cases in Beaven's Reports *ante*, the Court has in some cases without any words in the agreement held the parties strictly to their bargain as to time. Such cases generally depend upon the character of the property sold or the surrounding circumstances. Williams Vendor & Purchaser, 576, gives as illustrations, sales of reversions or short leases, property used for trade or business purposes as a public house, property required at once for a residence and property of a speculative character such as mines. Similar decisions as to mines are to be found in Ontario in *Sanderson* v. *Burdett*, 16 Gr. 119, and *Thompson* v. *McPherson*, 3 O.W.N. 791. The Toronto land boom of 1888 furnishes another illustration of the rule where vacant land was purchased for speculation and one of the parties made default. It was ultimately held that punctuality was inherently essential and the delinquent plaintiff was refused specific performance, *Robinson* v. *Harris*, 21 O.R. 43, 19 A.R. 134, 21 S.C.R. 390.

Having considered, therefore, the treatment which stipulations as to dates receive at the hands of the Courts, it remains to consider when a purchaser may claim his equitable interest in lands even though he may be late in seeking it. Again, it must be stated that we are not considering questions of waiver as they really involve an enquiry whether by words or conduct a new contract has been made or whether on grounds of estoppel a *quasi* contractual situation has arisen. Even though time is not expressly or by implication essential yet laches will always prevent a purchaser from enforcing specific performance. The Supreme Court of Canada has expressed the doctrine in pretty drastic terms in *Wallace* v. *Hesslein*, 29 S.C.R. 171, though the facts showed great laches on the purchaser's part. The Chief Justice there says (page 174): "In order to entitle a party to a contract to the aid of a Court in carrying it into specific execution he must show himself to have been prompt in the performance of such of the obligations of the contract as it fell to him to perform and always ready to carry out the contract within a reasonable time, even though time might not have been of the essence of the agreement" and, at page 177, he says that the purchaser

must be "ready, prompt and eager" to complete. Mr. Justice Anglin describes this as "what may appear to be an extreme view of the duty of a purchaser who claims specific performance"; *Bark-Fong* v. *Cooper*, 49 S.C.R. 30. The terms criticized, however, are not original with the Supreme Court, as in *Milward* v. *Earl Thanet*, 5 Vesey 720, note, it was said that the purchaser must show himself "ready, desirous, prompt and eager." The rule in England, however, is that where, by the terms of the contract, by subsequent notice or because of the nature of the property the time feature is not essential, delay will not defeat specific performance unless it amounts to an abandonment of the contract; 27 Hals. 69, and Mr. Justice Anglin points out that this is the true ground of the decision in *Wallace* v. *Hesslein*. It has been said that the rule here ought to be different or rather differently applied owing to our different local conditions, *Hook* v. *McQueen*, 2 Gr. 491, 4 Gr. 233, a case containing a useful review of the topic; but the principle adopted seems to be the same, namely, that delay is evidence of abandonment, the only real difference being that less delay will furnish such evidence here than in England. After all if the criterion is intention to abandon it must be a question of fact in each case whether that intention appears.

Different considerations, however, arise where the time feature is essential and the purchaser being in default seeks specific performance of his contract. In *Moodie* v. *Young*, 1 Alta. R. 337, it was held that the provision making time of the essence of the contract was penal so that the Court could relieve against it though the purchaser was late with his payments, but in *Steele* v. *McCarthy*, 1 Sask. R. 317, it was held that the Court has no power to relieve against such a clause where the vendor has cancelled and the purchaser seeks specific performance as it is purely a matter of contract between the parties. These cases are cited as showing the opposing views upon a point recently much mooted in the Ontario Courts. The point came up in 1908 in *Labelle* v. *O'Connor*, 15 O.L.R. 519, where the trial Judge and one Judge in appeal considered the time clause penal so that the purchaser could claim specific performance after his default.

The other Judges in appeal held that the clause was merely contractual and that as the vendor had elected to rescind upon default the Court could not enforce the contract, so that under this decision the purchaser's interest in the property is lost if he does not strictly comply with the time clauses in his contract and if they are of the essence of the contract. One clause in the judgment of Mr. Justice Anglin in this case, at page 546, should be noted, because it anticipates an important distinction arising out of later Privy Council decisions to be presently considered. It is as follows: "The right of a purchaser to specific performance is one thing, and his possible equity to relief from forfeiture of purchase money paid on account . . . is quite another." In other words, the purchaser's interest under his agreement to purchase may be forfeited if there is a time clause, the purchase money previously paid by him is not necessarily lost even though the agreement may provide for its forfeiture. In 1912 arose the case of *Snell* v. *Brickles*, first reported in 28 O.L.R. 358. There was a "time of the essence" clause calling for closing on March 15th. Both parties wanted to close and were nearly ready but on March 13th the purchaser's solicitor fell ill and did not return to work till March 18th. On trying to close then the vendor declined and kept the deposit. Purchaser sued for specific performance. The trial Judge granted relief, the Appellate Division on March 6th, 1913, reversed him, following *Labelle* v. *O'Connor*. On February 26th, 1913, judgment had been given by the Privy Council in *Kilmer* v. *British Columbia* (1913) A.C. 319, and owing to the very general expressions in that case it is quite likely that if the Appellate Division had seen it, its judgment in *Snell* v. *Brickles* might have been different. In February, 1914, the case was considered by the Supreme Court (49 S.C.R. 360) and while the Court reviewed numerous decisions and talked of many things, it is sufficient for our purposes to say that it followed the Kilmer case, reversed the Appellate Division and granted specific performance, two Judges dissenting. At that time the House of Lords had not delivered judgment in *Stickney* v. *Keeble* (1915) A.C. 386, a case where time was made essential by what was held to be a reasonable notice given after

the date for completion had passed. The Kilmer case was not discussed, but some passages in the judgment might have warned the Supreme Court if they had seen them, that where the claim is for specific performance by a purchaser and not for relief against forfeiture of purchase money paid on account, a time clause would not be ignored; see pages 402 and 416. Then in December, 1914, was decided *Steedman* v. *Drinkle* (1910) A.C. 275, where the Privy Council explained the Kilmer case and made the distinction suggested by Anglin, J., in *Labelle* v. *O'Connor*, 15 O.L.R. at page 546, quoted *ante*, between a claim for specific performance and a claim for relief against forfeiture of purchase money. Viscount Haldane says, page 279, "Courts of Equity which look at the substance as distinguished from the letter of agreements no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be the essence of their bargain." If this case had been decided a year earlier it is safe to say that the decision of the Supreme Court in *Snell* v. *Brickles* would have been different.

In view of the explanations of the Kilmer case given by the Privy Council it is not surprising that leave to appeal to the Privy Council was granted or that the judgment of the Supreme Court was reversed in July, 1916; *Brickles* v. *Snell* (1916) 2 A.C. 599. The Judicial Committee recognized that the purchaser's default was trivial but said that the vendor might "stand upon the letter of his bond," page 604, and refused specific performance, distinguishing the Kilmer case on the ground of waiver of default by the vendor in the latter decision and ordering the purchaser to pay all costs. Thus ended this tragedy. The Appellate Division, not knowing of the Kilmer case decided in England only a few days earlier, quite rightly followed *Labelle* v. *O'Connor*, the Supreme Court having the wide terms of the Kilmer judgment before it naturally followed that and the Privy Council having limited those wide expressions had to reverse the Supreme Court.

One would like to know what the purchaser thinks of it all. In view of these later decisions it may be that the case of *Boyd* v. *Richards*, 29 O.L.R. 119, decided in June, 1913, will require reconsideration. It not only relieved against forfeiture of instalments of purchase money but granted specific performance after default. There were special circumstances justifying a decree for specific performance and the decision may perhaps be supported on that ground.

To sum up this branch of the matter the following propositions are suggested:—

1. The purchaser has an equitable interest in land agreed to be purchased from the moment the contract is entered into.

2. Where time is not expressly made of the essence of the agreement this interest will not be forfeited by delay not amounting to abandonment unless the subject matter of the sale is of such a character as to make punctuality essential in equity.

3. Where time is made of the essence of the contract and the purchaser defaults the vendor may "stand upon the letter of his bond" and forfeit the purchaser's interest and the Court cannot relieve against this forfeiture.

2. *Can the vendor after purchaser's default rescind his agreement and keep the deposit?*

The forfeiture of the purchaser's interest in the land is not the only question arising upon default under a real estate contract. There is usually money in the vendor's hands called a deposit and the ownership of this deposit is often an important matter. The deposit in modern parlance is generally "money paid to the vendor as a guarantee that a contract will be performed," James, L.J., *Ex p. Barrell*, 10 Ch. App. 512, p. 514. It may ultimately become, but is not necessarily, part of the purchase money, nor does it appear only in real estate transactions. "Something in earnest to bind the bargain" is one of the alternatives required as evidence in sales of goods by the Statute of Frauds and who knows that the practice of adjourning to the public house and buying a vendor or purchaser a drink may not have been at one time a form of "solemnizing" a contract. The antiquity of this earnest or deposit is discussed by Lord Justice

Fry in *Howe* v. *Smith*, 10 Ch. Div., pp 101 and 102. Its primary object is to ask the purchaser to shew his good faith by putting at stake something of value which he will lose if he does not carry out his bargain. Usually the contract provides that a deposit shall serve two purposes. "Its primary purpose is that it is a guarantee that the purchaser means business," but "if the purchase is carried out it goes against the purchase money," Lord Macnaghten in *Soper* v. *Arnold*, 14 A.C. 429, p. 435. In other words, it is a forfeit while the contract is executory, it becomes a payment on account when the contract is being completed. This being so there seems to be no doubt that under certain circumstances the vendor may keep it. What then are those circumstances? Broadly, the answer is: "Even where there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract he cannot have back the money as the contract has gone off through his default," Mellish, L.J., *Ex. p. Barrell*, 10 Chy. App. 512, p. 514. This repudiation need not be express. Inability to pay the balance of the purchase money is a sufficient repudiation to work a forfeiture: *Soper* v. *Arnold*, *supra*, and the purchaser even "may appear to be insisting on his contract, in reality he has so conducted himself under it as to have refused and has given the other side the right to say that he has refused performance. He may look as if he wished to perform but in reality he has put it out of his power to do so"; *Howe* v. *Smith*, 27 Ch. D. 89, p. 99. This case was followed in an appeal from our own Courts where $250,000 had been paid as a deposit and the purchaser being in default failed to recover: *Sprague* v. *Booth* (1909), A.C. 576. The fact that the deposit is in the hands of stakeholders does not prevent the vendor from recovering it if the contract is rescinded; *Hall* v. *Burnell* (1911), 2 Ch. 551. This being the nature of the deposit the question arises whether a purchaser in default can ask relief against its forfeiture? It must be borne in mind that the vendor cannot forfeit and claim specific performance or treat the contract as existing. He must rescind or acquiesce in the purchaser's repudiation: see Williams Vendor and Purchaser, 1055, and *Hall* v. *Burnell*, *supra*. In *Fraser* v. *Ryan*, 24 A.R. 441, at

p. 444, The Chancellor says: "The contract has been ended by mutual action of the parties and the law leaves them where they have put themselves. Whatever money has passed from one to another cannot be recovered . . . The contract is at an end and all rights thereunder and remedies thereon end therewith except that damages for the breach of it may be sought by the vendor." If this language refers to more than the deposit it may require explanation in the light of later cases but as to the deposit, it is submitted that it accurately states the law for Ontario. The purchaser being in default and the vendor rescinding, it may be taken as law that as a rule the Court will not relieve against forfeiture of the deposit.

There may be some exceptions to this, though it is hard to find a decision expressly in point. In *Howe* v. *Smith*, 20 Chy. Div. 89, at p. 95, Cotton, L.J., says: "I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may be that there may be circumstances which would justify this Court in declining and which would require the Court according to its ordinary rules to refuse to order specific performance in which it could not be said that the purchaser had repudiated the contract or that he had entirely put an end to it so as to enable the vendor to retain the deposit." Perhaps *Snell* v. *Brickles* would have fallen within this suggested exception had the pleadings been so framed. In the Supreme Court, 49 S.C.R. 360, at page 383, Mr. Justice Anglin, who there dissented, says that part of the deposit remaining with the vendor should be returned. His judgment rests upon the ground suggested in *Howe* v. *Smith* that, having regard to the very short default—three days—and to the fact that the purchaser's conduct did not amount to repudiation, though he neglected to comply strictly with the terms of the contract, the deposit or part of it should be returned; and in the Privy Council (1916), 2 A.C., at page 604, it is said that it was unfortunate that the pleadings did not ask for a return of the deposit so that futher litigation should be avoided. It may be, therefore, that where specific performance cannot be granted because of delay and because time has been made of the essence

of the agreement; yet relief may be granted against forfeiture even of a deposit if the purchaser's default is inadvertent and not equivalent to a repudiation of the contract. Any claim to such relief should be carefully scrutinized as the deposit might have been insisted upon not merely as a guarantee for performance but as a guarantee for *punctual* performance, and to treat a deposit as something to be returned to a purchaser in default is to deprive it of its character as a deposit altogether.

The answer to this second enquiry, therefore, appears to be:—

1. Upon default by the purchaser constituting a breach of contract by him the vendor may retain any money paid by the purchaser as a deposit.

2. Whether a Court of Equity will relieve against forfeiture of a deposit when the purchaser's delay is inadvertent and not tantamount to a repudiation of the contract *quære?*

3. *The purchaser having paid some instalments of purchase money makes default. Can the vendor cancel the sale and keep the instalments?*

Many agreements for sale provide for payment of purchase money by instalments, postpone delivery of the deed until the whole or a certain number of the instalments are paid and stipulate that upon default the contract shall be no longer binding on the vendor who may retain all instalments paid as liquidated damages. Time is usually made of the essence of such agreements. Under them the purchaser acquires no legal estate for some time but his equitable interest becomes increasingly valuable as his instalments are met and it becomes a serious problem: (1) whether he loses his interest in the lands by default (2) whether, if that interest is lost, he may recover his instalments paid (3) if so, whether the vendor may deduct from them any damages he has suffered through the purchaser's default.

The first of these enquiries has been dealt with in considering the purchaser's right to specific performance notwithstanding his delay and will not be further discussed.

The second enquiry deserves some consideration. We eliminate all cases of deposit as they have also been dealt with and consider only payments which do not bear such character. Logi-

cally there should be no different treatment of the cases of forfeiture of the purchaser's equitable interest in lands after the contract is signed and forfeiture of any money he may pay and imperil by his subsequent default, but practically there is a difference. If he loses an interest in lands for which he has paid nothing he loses his bargain and the advantages, more or less problematic, to accrue from it, but if he loses the money paid and has nothing to shew for it, there is nothing speculative about his loss, it is very real and definite. Consequently we find a different treatment (for instance of the time clause in agreements) according to whether it creates forfeiture merely of the equitable interest in lands or forfeiture of purchase money paid on account.

As there has been so much confusion in the cases it may be no harm to make a few distinctions even though they involve a certain amount of repetition.

First: Specific performance of a contract may sometimes be granted to a purchaser in default who has paid part of his money. In such cases the purchaser saves the money paid by paying the rest of it with interest and costs. The nature of the relief granted is really an extension of time for payment. Instances of this are *Re Dagenham*, L.R. 8 Ch. D. 1022, and *Kilmer* v. *British Columbia* (1913), A.C. 319, and the limits set to such relief are laid down in *Brickles* v. *Snell* (1916) 2 A.C. 599.

Second: Where the vendor has had judgment for specific performance under a contract containing no provision for forfeiting purchase money and a purchaser cannot pay the rest of the money a practice has developed in Chancery permitting the vendor to rescind the contract and retain his costs out of the purchase money in his hands and even to keep the deposit if the agreement so provides, but apparently he cannot keep any other purchase money in his hands: Fry Specific Performance 11th ed., 578 and 579, *Griffiths* v. *Vesey* (1906), 1 Ch. 796; *Shuttleworth* v. *Clews* (1910), 1 Ch. 176. These rights do not depend merely upon contract but constitute the practice of the Court whereby it seeks to assist a vendor who holds an unsatisfied judgment for specific performance against a purchaser.

3. There are cases where the following elements appear:—

(1) Default after payment of part of the purchase money other than the deposit by the purchaser.

(2) Rescission by the vendor.

(3) Forfeiture of the moneys paid.

(4) Claim by purchaser for return of his money but no demand for specific performance.

It is this kind of case which now calls for some consideration. Leaving aside the minor questions of interpreting contracts which continually arise and are different in each contract, there are two broad classes (*a*) those where there is no forfeiture clause; (*b*) those containing a forfeiture clause.

(*a*) *Where there is no forfeiture clause:*—If more than a deposit has been paid and there is no forfeiture clause it would appear by analogy from the cases where judgment has been given for specific performance against a purchaser that if the vendor tries to rescind the contract he must return the purchase money other than the deposit. This was the course adopted even as to the deposit in *Mackreth* v. *Marlar* (1786), 1 Cox Equity Reports 259, but there the question was not distinctly raised whether the deposit would have to be returned. Apparently the vendor conceded the purchaser's right to the deposit as otherwise deposits need not be returned if the purchaser is in default. The case is authority, however, for the propsition that the vendor must return everything but the deposit; see also Williams Vendor and Purchaser 1051, note M, and 1120. It naturally follows also from the attempt to rescind the contract; the contract being put an end to both parties must be remitted to their original position. If the vendor is not satisfied with that he should not try to rescind; he should bring an action based upon the contract claiming damages for breach by the purchaser. We may assume, therefore, that if the vendor rescinds a contract which contains no provision for forfeiting the purchase money he must give back any purchase money paid except the deposit.

(*b*) *Where there is a forfeiture clause:*—Where agreements are entered into for payment of purchase money by instalments, they almost always provide for cancellation and retention of all purchase money paid as liquidated damages for default. Where

after default the vendor cancels pursuant to his agreement he is not rescinding it, in the sense that the parties are in the same position as though no bargain had been made. He is performing the contract and at common law he would be entitled to whatever remedies that situation gives him. One of those remedies is the right to retain all purchase money paid, and the purchaser having agreed to it, cannot object at common law.

A comparison, therefore, of cases (*a*) and (*b*) will shew the importance of provisions for cancellation and forfeiture in all contracts for payment of purchase money by instalments.

The main question, therefore, under this general heading is whether if the purchaser cannot obtain or does not wish to obtain specific performance, he is entitled to ask for relief against this forfeiture. At common law he was helpless and so his appeal is necessarily to equity and the problem is whether this is one of those penalties and forfeitures from which the Court of Chancery grants relief. In Ontario it was not so treated. The case of *Fraser* v. *Ryan*, 24 A.R., p. 441, already quoted, while a decision upon another point declares that where the purchaser has not complied with his agreement he cannot recover any part of the money which he paid; see also *Gibbons* v. *Cozens*, 29 O.R. 306, and *McCammond* v. *Govenlock*, 2 O.W.N. 563.

In Manitoba and the North West Provinces the matter has received a good deal of consideration and apparently it was the practice in Alberta for vendors holding agreements of this kind and having part of the purchase money in their hands to sue after default for recission and for a declaration that the purchase money was forfeited; see *Great West Lumber Company* v. *Wilkins*, 1 A.L.R. 155; *Merriam* v. *Paisch*, *ibid*, 262; *C.P.R.* v. *Meadows*, *ibid*, 344, and *Schurman* v. *Ewing*, 2 A.L.R. 168, and even though the defendant did not appear some of the Judges refused to rescind and forfeit the purchase money. Instead they appeared to mould the practice governing cases where a vendor's judgment for specific performance against the purchaser remained unsatisfied, and instead of declaring a forfeiture they gave the purchaser time to redeem and directed a sale of the lands after the time limited, authorising the vendor to retain the amount of his principal, interest and costs, and ordering him to pay the balance

in his hands to the purchaser. Mr. Justice Beck went so far as to declare the forfeiture clause void. This practice was not assented to by Mr. Justice Stuart, whose dissenting judgment in *C.P.R.* v. *Meadows* is interesting and valuable, and it was not followed in Saskatchewan: *Steele* v. *McCarthy*; 1 Sask. L.R. 317.

The decisions in Alberta are not quoted as authority for the purposes of this article but merely to shew how widely Judges can differ upon the point. Nothing could be more marked than the strict common law forfeiture enforced in Ontario and the wide equitable practice adopted in Alberta. Our only enquiry, however, is to consider whether the recent decisions in the Privy Council indicate more clearly than the older cases the method which ought to be pursued everywhere. Notwithstanding the forfeiture strictly enforced in Ontario, it is submitted that there was always inherent in the cases a form of relief applicable to contracts of this kind; that is the principle that although a contract provides for forfeiture of payments of any description under the term liquidated damages, yet if such payments are not a fair pre-estimate of the probable damages then the provision for forfeiture is a penalty and not liquidated damages. This is one of the principles enunciated in *Wallis* v. *Smith*, 21 Ch. D. 243, and it is submitted that there is no reason why it should not apply to a contract to pay for lands by instalments as well as to any similar contract. It should be peculiarly applicable because, as pointed out in later cases, the more purchase money there is paid before default the heavier will be the penalty if the purchaser afterwards breaks his contract, so that the more nearly the purchaser performs his contract the heavier and not lighter will be the damages he must pay; see *Barton* v. *Capewell*, 68 L.T.R. 857. In that case there was an agreement for the sale of patent rights by instalments with provisions for cancellation and forfeiture as liquidated damages. The purchaser made default and afterwards made no attempt to have the agreement specifically performed. Probably specific performance was impossible. The Court there declared that the provision for forfeiture was a penalty, that it should be relieved against and that an enquiry should be directed to ascertain what damages the vendor had suffered by the breach, with a direction for payment of any balance to the purchaser.

This method had been adopted in Saskatchewan and in *Drinkle* v. *Steedman*, before Mr. Justice Newlands in 1912, while he refused specific performance he offered an amendment so that the purchaser might be relieved from forfeiture of the instalments he had paid. This was not accepted and the purchaser appealed. The Supreme Court of Saskatchewan reversed this judgment, following the *Kilmer* case, as the Judges thought, and granting specific performance. On appeal to the Privy Council the latter judgment was reversed and the judgment of Newlands, J., restored; but with the same proviso granting relief from forfeiture of the instalments. The trial judgment is not reported but it may be found in Vol 42 of the Printed Cases in the Privy Council at Osgoode Hall Library. The other reports are, 7 Sask. L.R. 20, and (1916) 1 A.C. 275.

The result is that a Court of final resort has declared that relief against forfeiture of purchase money will be granted even in cases where specific performance cannot be had. It is, therefore, submitted that the earlier decisions in our Courts are no longer law, and that if specific performance is not granted then the proper relief is that which was given in *Barton* v. *Capewell*, namely, a declaration relieving against forfeiture and a reference as to damages, with appropriate provisions for repaying the balance of purchase money to the purchaser, if any balance is found due to him; see *Boyd* v. *Richards*, 29 O.L.R. 119.

Therefore, the following is suggested as an answer to our third enquiry:—

(1) If there is no provision in the contract for cancellation and forfeiture of instalments of purchase money then, if the vendor seeks to rescind instead of suing for damages or for specific performance, he must return all purchase money except the deposit.

(2) If the agreement contains a provision for cancellation and for forfeiture of purchase money the vendor may cancel, but the purchaser is entitled to a declaration that the purchase money paid is not forfeited, but is held only as security for the true amount of damages which the vendor has suffered by reason of the purchaser's breach of contract.

SHIRLEY DENISON.

THE RIDDELL CANADIAN LIBRARY.

Not only the Law Society of Upper Canada, but also the country at large are under a debt of gratitude to Mr. Justice Riddell of the Supreme Court of Ontario for the generous gift to which we now desire to refer. We are glad for the gift and we appreciate the energy and interest of the donor, who is from time to time enriching this very valuable and instructive collection.

Last year he presented to the Law Society his full collection of Canadiana (and Americana) to form the nucleus at Osgoode Hall of a Canadian Library. This Library, called after the donor "The Riddell Canadian Library," is temporarily housed in the room off the General Library immediately south of the King's Bench Court room, but it is hoped that more appropriate quarters will soon be found for these valuable volumes.

There are not far from two thousand items altogether; and the books are of the most varied character—travels in Canada from the time of Kalm the Swedish traveller, represented in the early and rare German edition of 1757; la Rochefoucault in 1795, in the very rare first French edition of l'An VII. and the first English quarto edition of 1799; Heriot in a sumptuously bound copy of the quarto edition of 1807, Howison, Duncan, McGregor and many others.

We find histories from Parkman upward and downward, descriptive works like Lillie, Smith, etc. (among them the exceedingly rare volume by D'Arcy Boulton, afterward Mr. Justice Boulton); Col. Strickland describes the Canada of his day as do his talented sisters Mrs. Moodie and Mrs. Traill and the novelist Captain Marryat in less formal but no less accurate characterization. And from the Upper Canadians of the very early period of the history of our Province to the uncouth Doukhobor of to-day, hardly a decade or a class of the community fails to receive description in some work of this collection.

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the times of Confederation, there are many volumes of the lives of those who made Canada what it is.

The biography of others than politicians and statesmen is not neglected, the leaders in the Church in all its branches, in education in its manifold forms, of pioneers in settlement—all these receive due attention.

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Not least in value is the collection of pamphlets bearing on all kinds of subjects from University Education to plans for Savings' Banks.

From his personal acquaintance with the Secretary of State of the United States, Mr. Justice Riddell has received for the Library a valuable donation of books, maps etc., dealing with international law and the arbitrations between Canada and the United States—and in the same way his friendship with the Ambassadors of France and China has procured from their governments interesting volumes of great value. The Russian Ambassador has sent illustrated volumes, some of which show the horrible atrocities perpetrated by the Prussians on Russian prisoners.

Historical Societies or Commissions of many States have also contributed their publications, New York, Illinois, Wisconsin, Michigan, North Dakota and many others—many of these volumes bear directly upon early Canadian history.

The local histories of Canada have been procured so far as possible, and the transactions of many local Historical Societies are also to be found on these shelves.

The collection is being constantly added to by Mr. Justice Riddell from purchases made in the British Isles, in this country and in the United States; and as it is desired that everything of Canadian interest should be obtained for this Library, it is to be hoped that all Canadians will send copies of their own works and of the works of other Canadians as well as other works of all kinds which have Canadian interest. Many Canadians have already responded to Mr. Justice Riddell's invitation to send

books, pamphlets, maps, etc., dealing directly or indirectly with Canada or Canadian past or present or having Canadian interest: but there must be a large quantity of such materials yet to be gathered in.

We would urge our readers to take an interest in this Library and assist it as far as possible.

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*APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR IN MASTER AND SERVANT CASES.**

Generally.—The phrase, *res ipsa loquitur*, literally translated, means that the thing speaks for itself, or the thing itself speaks. As used in law, it is merely a way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify the conclusion that the accident was caused by negligence. The inference of negligence is deducible, not from the mere happening of the accident, but from the attendant circumstances.

There seems to be a widely prevalent idea that the relation of master and servant is *per se* inimical to the application of the maxim *res ipsa loquitur*, and that the maxim is one specially designed for cases in which a traveller is injured while on a public highway, or while he is a passenger in the conveyance of a common carrier. This general impression may be due in part to its origin, for it seems to have been applied at first only to cases in which the defendant's contractual obligation to the injured person was practically that of an insurer, and in part to its subsequent extension to actions in which there was no contractual relation between the parties. "It may be fairly surmised, at any rate, that the great preponderance of these two classes of cases in the category to which the maxim has been applied has given rise to the occasional expressions in some of the text-books and decisions, indicating that its application is regarded as depending

*This article is copied from the Central Law Journal of St. Louis. Authorities are cited for the various propositions are given in foot notes (Vol. 84, p. 67.)

primarily upon the relation of the person injured to the defendant whom he sues; but, from whatever source this view may have sprung, the fact remains that it is not supported by the maxim itself nor by the decisions of this Court."

Although there are numerous cases stating that this rule is not applicable in actions by employes to recover against their employers for injuries received in the course of their employment, the logical and sensible view is that where the facts warrant it' application the rule applies in master and servant cases as well as in other classes of cases.

The application of the doctrine does not depend upon the relation of the injured person to the person or party who is charged with causing the injury, but upon the explanatory circumstances which surround the happening of the accident.

It is generally held by the Courts which apply the doctrine in master and servant cases that where the evidence of the accident was such as to leave it purely a matter of mere surmise or conjecture whether the injury was due to a cause for which the employer is liable the doctrine of *res ipsa loquitur* is not applicable. Under the evidence adduced in the trial of some cases it can as well be said that the injury resulted from a cause as to which the employe assumed the risk, or for which a fellow-servant was responsible, as that it was due to some cause resulting from the employer's negligence. But, it is held, where the evidence is of such a nature as to fairly warrant the inference as a fact, in the absence of explanation, that the accident was due to a cause for which the employer is liable, the doctrine applies.

It appears that the Courts apply a stricter rule in their requirements as to what constitutes a *primâ facie* case under this doctrine in master and servant cases than they do in cases in which passengers are seeking to recover from common carriers for injuries. This is explained by some by reference to the higher degree of care owed by the carrier to its passengers than is owed by the employer to his employes. This explanation is far from satisfactory, however. The degree of care is immaterial if the accident was due to a cause for which the defendant is not responsible. The higher degree of care imposed on the carrier may

broaden the scope of its liability and render it liable in instances in which it would not be liable under an ordinary degree of care, but it is not made an insurer thereby. Its scope of liability is not infinite.

Then, too, the degree of care owed by the defendant has never been stated by any authority as a reason for the application of this doctrine. The reason for the rule is this: "When a thing which causes injury is shewn to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

If a passenger in the train of a common carrier is injured by the derailment of the train, he makes a *primâ facie* case by shewing that he was a passenger in the train, that the train was derailed, and that he was injured thereby. As matter of fact the wreck may have been due to any one of a number of causes for which the carrier is not liable. On the other hand, if an employe is injured he must not only shew that he was injured by an appliance or place of the employer, but he must exclude the idea that his injury was due to a risk assumed by him—which may have been a risk arising from the negligence of a fellow-servant. If the reason for the application of the rule is present, why compel the employe to go further in his proof than the passenger? If the employe is required to exclude all other sources of the cause of the accident than one for which the employer is liable, why not require the same of the passenger in his action against the carrier?

Again, in many jurisdictions assumption of risk (including the risk of a fellow-servant's negligence), like contributory negligence, is a matter of affirmative defense. Why, then, require the employe to prove that his injury was not due to such a risk in order that this doctrine may apply, when it is not required in other circumstances?

There seems to be no sound reason for refusing a full application of this rule in master and servant cases where the reason

for its application are present and their requirements have been fulfilled. The reason for the reluctance of the Courts to apply the rule in such cases is probably due to their inclination in the past to find and apply harsh rules inimical to the employe's interests.

In a New York case it is said that, "If the injured employe sues at common law and seeks to invoke the maxim, he must necessarily make proof of facts and circumstances which, under the common law, exclude every inference except that of the employer's negligence." The Court says that this is necessarily true. Why is it true? It is not required of any other litigant. With much solicitude a Court will say, as an excuse for not applying the maxim, that "It might have been due to the negligence of a fellow servant." Too many Courts have taken this position without reference to the language of the maxim or the reasons for its application. Instead of following the rule, they have offered sone excuse (never a reason) for not following it.

That some of the Courts would like to avoid the consequence of erroneous precedent is indicated by the following language taken from the opinion in an Illinois case: "The existence of a rule exempting master and servant cases from the operation of the general principles of the doctrine expressed by '*res ipsa loquitur*' has been doubted and a logical reason for it is difficult often to see; but we are unable to escape from the conviction that it is the settled law of this state."

The Supreme Court of Minnesota lays down a proper rule in the following language: "The doctrine of *res ipsa loquitur* applies, the other conditions to its proper application obtaining, to the occurrence of an injury in the relation of employer and employe, when such injury arises in the use of an appliance which it is the legal and nondelegable duty of the employer to furnish and to keep in a reasonably safe condition for use."

In a Missouri case it is said that, "Where the injury to the servant is traced to a defect in a particular instrumentality or appliance being used by the servant in his work, then there are many cases holding that the proof of the occurrence and its attendant circumstances furnishes sufficient proof of actionable negligence."

On the other hand, the doctrine does not apply when the evidence before the Court merely shews the happening of the accident. Negligence is never presumed from the fact only that an accident occurred. It would constitute no case for a plaintiff to say that while he was a passenger in the defendant's train he suffered the injury complained of. The injury may have been self inflicted, or inflicted by a fellow passenger for whose conduct, in the circumstances, the carrier was not liable. The circumstances accompanying an accident frequently raise an inference of negligence, but the mere occurrence of the accident never does.

It would be equally nonsensical to say, as some Courts have said, that the doctrine in question does not apply at all in master and servant cases.

The following illustrations will give a fair idea of the views entertained by the Courts on this subject:

Unexpected Action of Saw or Machine.—The sudden starting of a machine when it should be at rest is evidence of negligence on the part of the employer if unexplained.

The plaintiff was employed by defendant to operate a cut-off saw, arranged on two upright timbers which moved to and fro as the saw was operated. When not in use the saw rested in a hood about 12 or 14 inches from the perpendicular, and was drawn forward against the timber to be sawed. At the time in question the saw had been placed back in the hood, and plaintiff was engaged in straightening a pieee of timber, when the saw, which should have remained in the hood, unexpectedly sprang forward and injured the plaintiff. It was held that under the doctrine of *res ipsa loquitur* the circumstances raised an inference of negligence on the part of defendant which it was required to explain or disprove.

Without any known cause the arbor next to a saw, about which plaintiff was employed, flew out of the box and the saw fell to the ground, severely cutting plaintiff's foot. It was held that the doctrine did not apply, that there must be some evidence shewing what the defect or negligence was that caused the accident.

In an action by an employee to recover for injuries there was evidence that the carriage of the sawing machine, at which he

was employed, started up and injured him when it was left at rest with the steam shut off and the lever locked which was used to start and stop it; that a machine which would do that was improperly constructed or adjusted, and was unsafe; that the defendant's foreman knew that the machine had started up in a similar manner three days before the accident. Held, that the jury were warranted in finding that the defendant was negligent.

Explosion of Oil Can.—The rule was held not to apply in a case where a locomotive engineer was injured by the explosion of an oil can which he was filling, because "the accident might have been due to improper handling as well as to improper furnishing the thing causing the accident," and because both the oil and the lamp were in the exclusive control and custody of the plaintiff "It cannot be said," said the Court, "that common experience points more closely to a defect in the oil or lamp attributable to the master than to some carelessness on the part of the servant using it; *primâ facie* such negligence will be attributed to the person charged by law with the duty of managing and maintaining the thing causing the injury.

Explosion in Mine.—The plaintiff was employed as a labourer under the orders of a certified miner who, upon inspection after firing a blast, directed plaintiff to go in and break up a large stone thrown out and to hasten. Plaintiff struck the rock a few times and by so doing exploded dynamite or a cap, whereby he was blinded. There was evidence that a careful inspection would have disclosed the presence of the explosive. Plaintiff was a certified miner, but had never worked as such. It was held that the doctrine of *res ipsa loquitur* applied, and verdict for plaintiff was allowed to stand.

Fall of Mine Roof.—In an action by a coal miner to recover for injuries caused by the fall of slate from the mine roof, it appeared that he had been assigned to work on a pillar of coal abutting the entry in question, and had not been there more than 30 minutes; that he had not removed any coal, and that no act of his could have occasioned the fall of slate; and that it fell from the roof directly over him. It was not disputed that it was

the defendant's duty to keep the entry in a reasonably safe condition. Held, that the case was properly submitted to the jury under the doctrine of *res ipsa loquitur*.

Fall of Crowbar. Where the plaintiff was working beneath several carpenters, in the service of the same employer, who were prying up a floor with a crowbar, and the bar fell and struck plaintiff, injuring him, and there was no evidence to shew why it fell, it was held that the evidence was sufficient to cast upon the defendant the necessity of explaining; that "unless defendant can account for the fall of the implement in such a way as to exculpate itself it will be held to have done the act negligently."

Fall of Article in Department Store.—The fall of a fire extinguisher in a department store, whereby an employe was injured, the cause of its falling being enexplained, was held not to raise a presumption of negligence on the part of the employer. "From the mere fact that the extinguishers fell from the counter, it cannot be assumed that they were negligently placed or that it was negligence to display them upon a counter. They may have been pushed accidentally by one of the clerks, or even by a passing customer."

Defective Coal Car Brake.—In an action in which it was claimed that the defendant coal company failed to furnish the plaintiff, its employe, with a reasonably safe brake for him to use on a coal-pit car which resulted in his injury, it was held that the doctrine did not apply.

Collision of Handcar and Train—The mere fact that a handcar, on which the plaintiff, a section hand, was riding with his crew, and a train collided furnished no proof of negligence on the part of the employer, the railroad company. "It is common knowledge that the use of handcars on railroad tracks is not supposed to stop or interfere with trains, but the sectionmen are to keep handcars off when trains approach, and that without any special warning or notice to them."

Roof of Freight Car Blowing Off.—The rule was applied in an action by an employe of a railroad company seeking to recover for injuries sustained when the roof of a box car, in a train of sixteen cars, was blown off by a wind so slight that he had no

difficulty in standing on the car, and the roofs of the other cars remained intact. This case arose under the Federal Employer' Liability Act, which takes away the defense of fellow servant.

Sudden Stopping of Train.—Where a section foreman was riding on an empty gravel train in the course of his employment, standing about the center of a flat car, and the train, which was moving 6 to 10 miles an hour, was suddenly and almost instantly stopped, so that he was thrown off the car to the ground and injured, the doctrine was applied. "The train was under the management of defendant's servants, and the instant stop of a train is not an occurrence in the ordinary course of things, if those who have the control thereof use proper care in its operation and with respect to its equipment. In such a case, *in the absence of any explanation* by the defendant, it affords reasonable evidence that the instant stop was due to a want of ordinary care."

Failure of Car Couplers to Couple on Impact.—Under the Federal Safety Appliance Act, which, *inter alia*, provides that it shall be unlawfulf or any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car in moving interstate traffic not equipped with couplers coupling automatically by impact, it is held that failure of such couplers to couple on impact raises an inference that the carrier has failed to comply with the standard created by the act.

Miscellaneous.—The rule was held not to apply where the injury to the servant was caused by the falling of a barrel from a stack near where he was working.

Where a servant in a factory was found dying, with his left arm and his neck broken, near an unprotected shaft, but there was no evidence as to the precise way in which the accident occurred, no one having seen it, the questions of the defendant's negligence and decedent's contributory negligence were for the jury.

The breaking of a hook in a crane was held insufficient to raise a presumption of negligence.

It was held not applicable in an action to recover for the death of a workman who was killed by the derailment of a hand-car while being transported to work.

The doctrine held not to apply in case of a boiler explosion.

Where the employe made the specific allegation that failure to brace certain posts was the cause of a traveling crane falling on him, the doctrine did not apply.

The doctrine was applied in an action to recover for the death of a locomotive engineer, who was killed when his engine was derailed by running into an open switch.

The pulling out of a draw-bar of a freight train affords a proper basis for the application of the doctrine.

The want of man power in England calls attention to the necessity of dispensing, as far as possible, with the services of jurors during the war, and the Attorney-General has announced that some action may be taken in reference to Grand Juries, owing to the fact that in these days magisterial investigations are so much more thorough than they used to be, that neither Grand juries nor Coroners juries are as importan tor so indispensable as they used to be. Whilst we think it would be a misfortune to do away with the jury system, we can well afford at the present time to dispense with the services of men who would be better employed on their farms, or in munition factories, unless indeed they are eligible for military service and if so they ought to be enlisted.

As we learn from *Law Notes*, a somewhat unique libel suit has recently been determined in New York, wherein a well-known magistrate recovered a verdict of $35,000 from the publishers of a popular novel on proof that a character, somewhat unattractively portrayed therein, was intended to represent him: (*Corrigan* v. *Bobbs-Merrill Co.*, 158 N.Y.S. 85). This case will doubtless go to appeal. The difficulty in such a case is not so much the law as the difficulty of proving the allegations.

REVIEW OF CURRENT ENGLISH CASES.

(*Registered in accordance with the Copyright Act.*)

SHIP—CHARTER-PARTY—BILL OF LADING CONCLUSIVE—EVIDENCE OF QUANTITY DELIVERED AS STATED THEREIN—ESTOPPEL.

Crossfield v. *Kyle Shipping Co.* (1916) 2 K.B. 885. In this case the plaintiffs were the holders of a bill of lading of timber, and sued the shipowners for shortage in delivery. The charter-party of the vessel by which the timber was shipped provided that the captain should sign bills of lading as per surveyors' return for the cargo, and that the bills of lading should be conclusive evidence of the quantity delivered to the ship as stated therein. The cargo was brought to the ship in lighters and owing to rough weather some of it was washed overboard from the lighters and lost. The captain's agent signed bills of lading nevertheless for the full quantity, as per surveyors' return. All the timber actually placed on board was delivered to the plaintiffs as indorsees of the bill of lading: and the question therefore was whether or not the defendants, in the circumstances, were liable for the shortage; and Bailhache, J., who tried the action, held that they were estopped by the bill of lading from denying that the full amount mentioned in the bill of lading had been received.

ADMIRALTY — SHIP — FORFEITURE — BRITISH COMPANY CONTROLLED IN GERMANY—PRINCIPAL PLACE OF BUSINESS OF COMPANY—BRITISH SHAREHOLDERS IN GERMAN CONTROLLED COMPANY—MERCHANT SHIPPING ACT 1906 (6 EDW. 7 C. 48) S. 51.

The Polzeath (1916) P. 241. This was a proceeding under the Merchant Shipping Act 1906 to determine whether a ship owned by a British Company, which had its principal place of business in Hamburg, and whose proceedings and business were controlled in Germany by a naturalized British subject of German origin who held the majority of the shares, was entitled to be registered as a British ship. Deane, J., held (1916) P. 117 that it was not, and that it was forfeited to the Crown, and the Court of Appeal (Eady, Phillimore, and Bankes, L.JJ.) affirmed his decision. The Court of Appeal rejected the claim of the British shareholders to relief, and held that their only resource was to appeal to the merciful consideration of the Crown.

SHIP—SEAWORTHINESS—SHIP FIT TO CARRY CARGO—IMPROPER STOWAGE—BILL OF LADING—EXCEPTED PERILS.

The Thorsa (1916) P. 257. This was an action by the consignees of a quantity of chocolate, for damages arising from its having been stowed in proximity to a number of gorgonzola cheeses whereby it had become tainted. The defendants relied on an exception in the bill of lading from liability for negligent stowage. The plaintiffs replied that the defendants could not rely on the exception because the ship was unseaworthy for carrying the chocolate, in that it was carried where it was liable to become tainted. Deane, J., who tried the action, held on the evidence that the ship was not unseaworthy, and that the damage in question was caused by negligent stowage, which was within the exception, and with this conclusion the Court of Appeal (Eady, Phillimore, and Bankes, L.JJ.) concurred.

PRIZE COURT—NEUTRAL VESSEL—CONTRABAND CARGO—DESTINATION NEUTRAL PORT—ULTIMATE ENEMY DESTINATION—CONDEMNATION OF VESSEL—ORDER IN COUNCIL ADOPTING ART. 40 OF DECLARATION OF LONDON.

The Hakan (1916) P. 266. This was a proceeding before the Prize Court for the condemnation of two neutral vessels captured with contraband cargoes ultimately destined for the enemy. Evans, P.P.D., held that it is now part of the law of nations that a vessel carrying contraband may be condemned if the contraband reckoned either by value, weight, or volume of freight, forms more than half of the cargo. He also held that where such a proportion of cargo is being carried it is not necessary to prove knowledge on the part of the owner or master that the cargo is intended for the enemy. He also held that the Order in Council adopting Art. 40 of the Declaration of London, which is a limitation of the rights of the Crown, is valid, and, under that Article, he held that a neutral vessel carrying a full cargo of conditional contraband to an enemy base of supply was subject to condemnation, and that the like penalty was incurred by a neutral vessel carrying to a neutral port a full cargo of contraband ultimately destined for the enemy.

PRIZE COURT—SHIP REGISTERED AS BRITISH SHIP—SEIZURE AS PRIZE—SHIP OWNED BY BRITISH COMPANY CONTROLLED BY ENEMY—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. C. 60) S. 1.

The St. Tudno (1916) P. 291. The vessel in question in this case was used as a tender for the vessels of the Hamburg-Amerika

Line coming to Southampton, and was nominally owned by a British company. The Hamburg-Amerika Line appointed the directors, and paid for their qualification shares, took from them an agreement to conform to their directions, received the profits, and in the person of its nominees owned the entire share capital of the company. Evans, P.P.D., held that the real owners of the vessel were the Hamburg Amerika Line, and that the vessel was enemy property, and as such liable to be treated as any other enemy ship in port at the outbreak of hostilities; and an order for its detention was made.

PRIZE COURT—PRIZE BOUNTY—DESTRUCTION OF ENEMY WARSHIP—NAVAL PRIZE ACT, 1864 (27-28 VICT. C. 25), S. 42—ORDER IN COUNCIL, MAR. 2, 1915.

The Sydney (1916) P. 300. By an Order in Council it was provided in pursuance of the Naval Prize Act, 1864, s. 42, that a bounty should be paid to the officers and crew of H.M.A.S. *Sydney* for the destruction of the *Emden*, to be calculated at the rate of £5 for every person on board the *Emden* at the beginning of the engagement. It appeared that part of the *Emden's* crew was on board a captured British ship which was being compulsorily used by the *Emden* as a collier, and the question was whether these members of the crew were to be included in the computation. Evans, P.P.D., held that all who were active members of the *Emden's* crew should be included, though some in the discharge of their duty might not actually be on board.

PARTNERSHIP—INSOLVENCY—DEATH OF PARTNER—WILL—TRUST TO PAY DEBTS—SURVIVING PARTNER RESIDUARY LEGATEE—CONVEYANCE TO LEGATEE—FALSE RECITAL—LEGAL ESTATE—PURCHASER FOR VALUE WITHOUT NOTICE—STATUTE 13 ELIZ. C. 5—(R.S.O. C. 134, S. 5).

Pearce v. *Bulteel* (1916) 2 Ch. 544. The facts in this case were somewhat complicated, but all that appears to be material for the present note may be briefly stated thus. A banking partnership existed between three persons, A. B. and C. A. was the owner of all the capital. Part of the capital consisted of real estate. The partnership deed provided that on the death of a partner the surviving partners might purchase the deceased's net share in the business, after providing for the debts A. died leaving a will, whereby, after providing for payment of his debts, he devised his residue to C., and appointed B. and C. his executors. B. and C.

elected to purchase A.'s interest in the partnership, and by deed, reciting that A.'s debts were paid, as executors of A. conveyed the lands above referred to C., the residuary legatee, who mortgaged the land to the defendant to raise money for carrying on the business, which, at the time of A.'s death, was in fact insolvent. The firm subsequently became bankrupt, and the trustee in bankruptcy attacked the mortgage to the defendant as being void under the statute of 13 Elizabeth, c. 5 (R.S.O. c. 134, s. 5), but Neville, J., held that the defendants were holders of the legal estate as purchasers for value without notice, and therefore were not bound by any antecedent equities of creditors of the bank, and the mortgage was not impeachable under the statute because it was not made for the purpose of defeating creditors, but with the intention of carrying on the business and paying them by that means.

INSURANCE (LIFE)—DEPOSIT—SALE OF BUSINESS BY COMPANY—DISSOLUTION OF VENDOR COMPANY—DEPOSIT—ASSURANCE COMPANIES ACT 1909 (9 EDW. VII. c. 49), ss. 2, 313—(9-10 EDW. VII. c. 32, s. 14 (D.)).

In re City of Glasgow Life Assurance Co. (1916) 2 Ch. 557. In this case a life assurance company had sold its business to another company and had been dissolved, and the question Sargant, J., had to determine was as to the proper disposition of the government deposit made by the vendor company. It appeared that there were outstanding claims in the nature of paid-up policies of the vendor company, the holders of which had not novated their claims with the vendee company. In these circumstances Sargant, J., held that the proper order to be made was to direct the deposit to be carried to a separate account "In respect of the life assurance of the" vendor company "now dissolved."

WILL—CONSTRUCTION—ANNUITY PAYABLE OUT OF INCOME OF SETTLED SHARE—RIGHT OF TRUSTEES TO RETAIN SURPLUS INCOME TO MEET POSSIBLE DEFICIENCY IN FUTURE.

In re Platt, Sykes v. *Dawson* (1916) 2 Ch 563. This was a case of construction of a will whereby the testator bequeathed a sixth share of his residuary estate to trustees upon trust out of the income to pay to his widow an annuity for life of £1,000, and "subject thereto to permit the same share and the income thereof" to devolve under trusts therein declared or referred to, in favour of the testator's son and daughter and their issue respec-

tively. A summary application was made by the trustees for the opinion of the Court as to whether they were entitled to retain the surplus in question, to provide for a possible deficiency in future years; a possible deficiency being immediately possible. Sargant, J., held that, although by the terms of the gift, the annuity was not dependent on the amount of the income, but was cumulative so that the deficiencies in any one year would have to be made good out of the surplus of any succeeding year, that did not entitle the trustees to retain surplus income from past years to meet possible deficiencies in future years.

WILL—CONSTRUCTION—TRUST FOR MAINTENANCE OF DAUGHTER —ACCUMULATION OF SURPLUS INCOME FOR TWENTY-ONE YEARS—SURPLUS INCOME AFTER TWENTY-ONE YEARS TO FALL INTO RESIDUE—THELLUSSON ACT (39-40 GEO. III. c. 98)—(R.S.O. c. 110).

In re Hawkins, White v. *White* (1916) 2 Ch. 570. By the will in question in this case the testator bequeathed two sums of £10,000 to trustees on trust out of the income to provide for the maintenance of his two daughters, and he directed the surplus income of each sum to be accumulated for a period of twenty-one years after his death, and at the end of that period the accumulations were to fall into the residue as capital and be disposed of as such. This was a summary application to determine what was the legal effect of this disposition, and Sargant, J., held that the direction that the surplus should fall into the residue as capital was an attempt to accumulate beyond the period permitted, and therefore that this disposition was null and void under the Thellusson Act (see R.S.O. c. 110, s. 2), and the will must be read as if it contained no such disposition, and that being so the surplus income after the expiration of twenty-one years, and also the income of the accumulations made during the term, were not undisposed of, but were properly payable to the tenants for life of the residuary estate.

Bench and Bar

ONTARIO BAR ASSOCIATION.

Annual Meeting.

The eleventh annual meeting of this Association was held at Osgoode Hall, Toronto, February 23, 1917. Owing to the war, the proceedings which have usually taken two days were condensed into one and the annual banquet was omitted.

The retiring President, Lieut.-Col. J. E. Farewell, K.C., gave an account of the proceedings of the past year and recounted many interesting experiences in connection with criminal matters arising from his experience as a County Attorney. Sir George Gibbon, K.C., Honorary President, also gave a short address.

Reports of the various committees were presented. That of Lieut.-Col. W. N. Ponton, K.C., Historian and Archivist of the Association, was read by Mr. Maclennan in Mr. Ponton's enforced absence. Further reference to this report will appear hereafter. Papers were also read by John S. Ewart, K.C., on the subject of Waiver, and by Hon. George Lynch-Staunton, K.C., on Company Law. We hope to give these to our readers in a subsequent issue.

The Committee on Criminal Law recommended three reforms as follows: (1) The payment of Crown witnesses attending preliminary enquiries or coroners' inquests. (2) That provision be made for calling and paying witnesses for the defence in murder trials. (3) That section 1140 of Criminal Code be amended so far as it relates to offences under sections 211, 212, and 215 B. At present prosecutions for such offences commence after the expiration of one year from the commission of the offence are barred. This should not be where the defendant's misconduct commenced at a period prior to the term of one year. A special committee was appointed to take these matters up with the Minister of Justice and the Attorney-General of Ontario.

The following resolutions were also passed: (1) That it is desirable to increase the fees payable to County Crown Attorneys for their services on prosecutions in Assize Courts. (2) That a committee be appointed to interview the Workmen's Compensation Board and discuss with them the question of having lawyers appear before the Board on behalf of injured workmen or their relatives. (3) That a committee be appointed to interview the Judges of the Supreme Court with a view to amend the

rules dealing with the payment of money out of Court so as to provide that money paid into Court as security for costs may be paid out to such solicitor after the disposition of the action.

The following are the officers for the year 1917:—

Hon. President, Z. A. Lash, K.C.; President, George C. Campbell; Vice-Presidents, R. T. Harding, N. B. Gash, K.C., George F. Henderson, K.C.; Recording Secretary, C. F. Ritchie; Corresponding Secretary, Arthur A. Macdonald; Treasurer, E. J. Hearn, K.C.; Historian and Archivist, Lt.-Col. W. N. Ponton, K.C.

War Notes.

LAWYERS AT THE FRONT.

KILLED.

Major Miles Langstaff. The promise of a brilliant professional career was cut short when Major Langstaff was killed in action last month in a battle on the Somme front, when Lt.-Col. Beckett his C.O., of Toronto, was also killed. He graduated from the Ontario Law School in 1912, as gold medallist. He was one of the best students that ever passed through Osgoode Hall. He enlisted in the 75th O.S. Battalion and rose rapidly to the rank of Major.

The annual report of the Nova Scotia Bar Society gives the following list of its members who have recently given their lives for King and Country. They are:—

Captain Charles D. Livingstone, admitted November 10th, 1903.
Captain William Gore Foster, admitted October 3rd, 1905, son of William R. Foster, Secretary of the Society.
Captain Horace Dickey, admitted January 19th, 1907.
Lieut. F. H. P. Layton, admitted January 6th, 1911.
Major Henry H. Pineo, admitted October 4th, 1915.

The same report tells of military honours conferred upon the following members of the Society: Captain Barry W. Roscoe, son of W. E. Roscoe, K.C., has received the D.S.O.; Lieut. Ivan S. Ralston, brother of Major J. L. Ralston, also at the front, has received the M.C.; Lieut. Owen B. Jones has been twice awarded the D.C.M.; Lieut B. W. Russell, has returned home wounded.

At a recent meeting of the English Law Society the President referred to the large number of the legal profession who had contributed to the successful prosecution of the war. He stated that at that time 2,689 solicitors and 1,335 articled clerks were engaged in military service, and that the great majority of those eligible to serve did so voluntarily and promptly.

Flotsam and Jetsam.

As we all know, and are glad to know, Mr. Lloyd George became Premier of the Imperial Government in the place of Mr. Asquith. This has met with general approval as it was felt that the former administration had not conducted the affairs of the nation, so far as the war is concerned (and that is the only matter of importance now) with the vigor which the occasion required. The special interest to the profession in this appointment is the fact that Mr. Lloyd George is the first "solicitor" who has become Premier. Members of the Bar have frequently occupied that position, but never before a solicitor. Sir Robert Finlay has become Lord Chancellor, stipulating that his right to a pension should be waived. Sir F. E. Smith remains as Attorney-General. Sir George Cave, who was Solicitor-General, having gone to the Home Office, his place has been taken by Mr. George Hewart.

At the recent meeting of The Ontario Bar Association, Mr. John S. Ewart, K.C., took exception to the use of the word "Confederation" as applied to Canada. A federation is a union of peoples, and has, therefore, a common or central legislature, acting directly on all the inhabitants as well as local legislatures; whereas a confederation is, by mere agreement, a union of states and has no common or central legislature. Like ourselves, the United States, Australia and Germany are "federations," whilst Austria-Hungary is a "confederation."

By a typographical error the case of *Turner* v. *Coates*, poetially rendered, was cited as having been reported in 115 L.J. It should have been printed 115 *Law Times*, 766.

Canada Law Journal.

VOL. LIII. TORONTO, APRIL, 1917. No. 4

RENEWAL OF WRITS BY DEAD SUITORS.

The case of *Mahaffy* v. *Bastedo* has now been published in the regular reports (38 O.L.R. 192), and having perused the report carefully, our view of the case is unchanged, and we think it somewhat strange that the very clear and convincing judgment of the Chief Justice failed to carry weight with the other members of the Court.

The judgment of the majority of the Court appears to be based on the following reasoning. Because a writ of execution issued in the lifetime of a suitor and delivered to the sheriff may be executed by the sheriff after the suitor's death, so long as the writ remains in force, therefore a writ so issued may be kept in force after the suitor's death by renewal in his name—such reasoning appears to be fallacious: because while the death of the execution creditor may not determine the authority of the sheriff to act under the execution, it does determine the power of the suitor to keep it alive, and if anything is necessary on his part to keep it in force, then his death puts an end to his power to take that proceeding, and it must be taken by some person in esse, who must first make himself a party to the record, and thereby acquire the right to take the proceeding.

To hold that such a proceeding can be validly taken in the name of a dead man, seems to violate a fundamental principle of litigation. A dead man cannot come into Court and ask to have a writ renewed, and if he can't act in person how can he act by attorney?

We see that Mr. Justice Middleton suggests that the renewal of the writ in the name of a dead man is a mere irregularity, which a stranger to the record cannot take advantage of: but a

proceeding in the name of a dead man is a nullity, not a mere irregularity. The application to renew a writ, though (by the practice of the Court) made to an officer of the Court on præcipe, must really be treated as if made to the Court itself. The officer is merely the instrument of the Court. If the Court itself cannot entertain applications on behalf of deceased suitors, how can its officer? If the application in this case, instead of being made to the officer of the Court, had been made to the Court itself, what would the Court say: or what ought it to say?

"*Counsel for deceased plaintiff.* I apply to renew a writ of execution.

"*Court.* For whom do you apply?

"*Counsel.* I apply on behalf of the plaintiff, who is now dead.

"*Court.* We are only authorised to administer justice to the living. The application is refused."

But what will the Court have to say hereafter in such a case? By s. 32 (1) of the Judicature Act it is provided that "the decision of a Divisional Court on a question of law or practice, unless overruled or otherwise impugned by a higher Court, shall be binding on all Divisional Courts, and on all other Courts, and Judges, and shall not be departed from in subsequent cases, without the concurrence of the Judges who gave the decision," therefore, henceforth all Provincial Courts will have to decide that writs of execution may be validly renewed in the name of a dead suitor and, so renewed, may be validly executed.

The moment you depart from well settled principles there is no knowing where you may get. If you may validly renew a writ in the name of the dead man, you may as validly issue it in his name. If you may issue a writ of execution in a dead man's name, why not also a writ of summons, or any other writ? If the solicitor may validly take proceedings in a dead man's name, then he is under no legal responsibility for so doing, and the suitor, being dead, is not responsible, and consequently any person injured by the taking of such proceedings is without remedy.

See, however, *Yonge* v. *Toynbee*, 1909, 1 K.B. 215; *Simmons* v. *Liberal Opinion*, 1911, 1 K.B. 966; 104 L.T. 264.

The death of a client of necessity puts an end to his solicitor's authority to act for him, and according to ordinary principles of law governing the relation of principal and agent, if the solicitor should take proceedings in his deceased client's name, he would be personally liable for so doing to the person against whom such proceedings were taken. Is that law intended to be upset?

STAYING EXECUTIONS ON APPEALS TO PRIVY COUNCIL.

In *Mitchell* v. *Fidelity & Casualty Co.*, 11 Ont. W.N. 371, the second Divisional Court has solved what appeared to be a somewhat difficult point of practice in a very satisfactory way, if one may be permitted to say so. The defendant had obtained from the Judicial Committee of the Privy Council special leave to appeal to His Majesty in Council, and desired to stay execution pending the appeal, and they applied to Mr. Justice Riddell in Chambers for that purpose. That learned Judge thought that the case was not governed by the Privy Councils Appeal Act (R.S.O. c. 54, s. 10) because that section only relates to appeals as of right, and consequently that where special leave to appeal is granted it is only the Judicial Committee of the Privy Council who have power to stay execution pending the appeal. The Divisional Court, while agreeing with Riddell, J., that s. 10 did not apply to such cases, came to the conclusion that the Court of first instance has an inherent jurisdiction to stay proceedings, and that by virtue of that jurisdiction it was competent to stay the execution as asked. It might have possibly proved a practical denial of justice in some cases, if it had been held that the jurisdiction to stay execution in such cases rested solely with the Judicial Committee; to say nothing of the expense of any application, however trifling, to that august body.

SUBPŒNAING A PARTY FOR IDENTIFICATION.

In a divorce suit of *Faruli* v. *Faruli*, 116 L.T. 18, the respondent was subpœnaed by the co-respondent for the purpose of being identified and Shearman, J., held that she could not be required to stand up for the purpose of identification. His Lordship also held it to be an abuse of the use of a subpœna to bring persons into Court by that method in order that they should be asked to stand up for the purpose of identification. It is possible this is merely intended to apply to the Divorce Court and to Divorce proceedings; but if in such proceedings it is an abuse of the use of a subpœna, why may it not be said to be so in any other case?, and yet the identification of a particular individual may be a most important element in a case, and if it is an abuse to compel him by subpœna to attend the Court for the purpose of identification, it becomes a serious question by what other method, which is unobjectionable, that end may be attained.

THE LATE SIR THOMAS WARDLAW TAYLOR.

Sir Thomas Wardlaw Taylor, whose death took place at Hamilton on the 2nd March last, was formerly a well known practitioner and official in the Courts of the Province of Ontario. He was a native of Scotland, being the son of the Rev. Dr. John T. Taylor, of Busby, County of Renfrew. He graduated at the Edinburgh University in 1852, and subsequently took the degree of M.A. at the Toronto University in 1856. He was admitted a solicitor in Ontario in 1858, and called to the Bar in 1858.

He practised his profession until he was appointed Secretary to the Judges of the old Court of Chancery in 1866. This office was subsequently converted into that of Referee in Chambers in 1871. In this capacity he discharged in the Court of Chancery similar duties to those now performed by the Master in Chambers, until December, 1872, when he was appointed Master in Ordinary of the Court, which office he held until 1883, when he was appointed a puisne Judge of the Court of Queen's Bench in Manitoba. The occasion of this appointment was marked by his friends of

the Ontario Bar by a suitable address and the present of a service of plate. In 1887 he was promoted to be Chief Justice of the Court, a position he filled with distinction until 1899, when he resigned. In 1897 he received the honour of Knighthood.

The late Chief was the author of several useful works, which in their day were in general request. Taylor's annotated Edition of the Chancery Orders was a *vade mecum* of Chancery practice, and his Commentaries on Equity Jurisprudence, founded on Story's work, and his little book on Titles were highly useful to students; and he in conjunction with Mr. J. S. Ewart published an annotated edition of the Ontario Judicature Act and Rules.

He was one of the committee appointed to prepare the third volume of the R.S.O. 1897, which was probably one of his last services rendered to the public.

After retiring from the Bench he returned to Toronto, where he resided for a short time, subsequently removing to Hamilton, where he died.

The late Chief was an able and accomplished lawyer, and acquitted himself in the various posts of honour and dignity to which he was called, to the general satisfaction of all who had business before him. His Scotch accent never forsook him and no one could ever mistake his nationality, but in every walk of life he proved himself a worthy representative of the men of North Britain.

UNCERTAINTY OF LAW.

Why is Law so uncertain? That is a question which has been asked a great many times, not only by those who have suffered from its uncertainties, litigants for instance, but even by those who practice it and who in the eyes of the public are the chief instruments of its ill-doings, namely: lawyers themselves. I think it will be found on a fair examination that most of the uncertainty is inevitable, and that is the result of a combination of circumstances for which neither lawyers, litigants nor Judges are responsible. Medicine, too, is uncertain, and yet medicine is dealing with fixed, unchangeable laws, the laws of

Nature. True, the particular doctor dealing with the particular case may not know them, but they are there to be known by those who have eyes to see and ears to hear.

How is it with Law? Every case that comes before a Judge is either one of pure law, as where there are no facts in dispute, or of facts only as where there is no question of law in dispute or, as generally happens, is one where there are questions both of law and fact involved. Let us take a case involving only a question of law. Here we are brought face to face with one of the peculiar difficulties of those whose laws are written in the English language, namely this, that our glorious English tongue is, above all those of the modern world, ambiguous. It is copious and that very copiousness leads to minute differences in meaning, so that it needs great care to embody any important proposition in the form of English without running the risk of being misunderstood. Now questions of law are largely questions of language, such as the construction of a statute or of inferences to be drawn from a certain decision. What does the statute mean? What does the decision mean? In answering these questions may arise dissensions, differences of opinion, appeals, and yet more appeals, and the long train of after consequences which sometimes gives law so ill-omened a name among those who have had to invoke its aid.

But there is something more. Lawyers and Judges are perhaps struggling with the construction of a statute in an honest effort to interpret the meaning of those who have promulgated it, and yet the fact may be that those who have promulgated it had no clear idea of what they themselves meant. The intention may have been to remedy some evil, but just what the evil was and how far it could be eradicated by legislation, and how best to frame the necessary legislation, these things may not have been considered by those who proposed and drafted the Act in question, or, if considered, the legislators were unable to embody their ideas in language, and so the law comes before the public and the Courts, like the famous leg of mutton that Dr. Johnson partook of in the Highlands, "ill-fed, ill-killed, ill-kept and ill-dressed." The Judge, therefore, in deciding a point of law in your case or

in mine has sometimes to wrestle (1) with the intention of the legislature, and (2) with the intricacies of the language in which this intention is clothed. Now, in speaking of the intention of the legislature, I have not forgotten the dictum of the English Judge (Willes it was, I think) who said that it was for the Courts to decide not on what the legislators meant but, on what they said they meant as set forth in some statute, and if the two could be kept entirely distinct—the principle of the Act and the language in which it is clothed—it might be well, but is not the dictum rather a counsel of perfection, good in theory and unattainable in practice? With these difficulties confronting him is it any wonder that a Judge's view may be different from that of the next Judge who has to do with the question, this other Judge being equally capable and equally industrious, or that a Court of Appeal, composed of four or five Judges, may differ from both? or that you, one of the litigants, may think them all wrong? Who is to blame? Assuming, as we may fairly do, that the Judges are capable and that the counsel representing the various parties are industrious, and yet seeing as we do that these differences of opinion exist, must we not bow to the fact that they are inevitable—inevitable at any rate until we have done two things—reformed the legislature and reformed the language. If any one wishes to see how easily ambiguity may arise, let him look at one of the last numbers of the Supreme Court Reports, vol. 51, p. 539, in the case of *Coffin* v. *Gillis*, on the question at issue as to certain foxes. Six Judges took one view and three another. What would have happened if the case had gone to the Privy Council? Who can tell?

So much then for questions of law, and now for questions of fact. In nearly every case the disputed questions of fact come down to two or three, however many may have appeared on the pleadings. It is something like a foot race, where many start and few come in at the end, for the majority fall out by the way. So in a lawsuit; by tacit or formal admissions, or as the result of cross-examination, a number of facts that were disputed at the beginning of the case are established at the end, but even so there are generally one or two left to perplex the Court. Three

credible witnesses have sworn one thing and three credible witnesses have sworn another to the contrary. None of them perhaps is wilfully telling an untruth—the contradictions are due to the imperfections, physical and moral, of humanity. Some of the witnesses are dull of sight, some are hard of hearing, some are stupid, some are careless, and some, almost unconsciously, are biased, and as in the case of a street brawl, for instance, or an accident, events happen so rapidly that the most acute observer may well err. Now, how can such difficulties be altogether overcome? Can you blame your solicitor or counsel if the case has turned out otherwise than he or you expected, unless indeed he has given you a positive assurance as to how it would result, an assurance that is very, very seldom given. The blame in that case would be for asserting anything positively, and in nearly all cases the wise lawyer will not do so. But there may be a time in the life of anyone where honour or reputation may force them into the Courts. He must

"Greatly find quarrel in a straw
When Honour's at the stake,"

even at the risk of losing in the quarrel, not because he is wrong, but because the case cannot be proved to the satisfaction of a disinterested party who is trying it.

Then there are questions of mixed law and fact—where the problem may be—what is reasonable? What would a prudent man do under the circumstances? What is negligence? What is a probable cause? Sometimes the burden is placed on the jury, but it may happen that the Judge has to determine them himself. Take a case of negligence. There are two questions involved: What is negligence? and does this case fall within the definition. It is hardly necessary to say there is room for great difference of opinion on such questions. I have suggested that to adjust those that depend on the interpretation of the law, we should reform the legislature and reform the language—two hard tasks truly, but to overcome the difficulties caused by the conflict of testimony we would have to eliminate such a conflict, and this could only be done by reforming or indeed making over humanity itself, so that every man would henceforth be Argus-eyed, with

the brain of a Gladstone and the inflexibility of a Solon. An extreme instance of the disagreements that may arise in a judicial proceeding is found in the famous Maybrick case. Mrs. Maybrick, some twenty-five years ago, was tried for the murder of her husband by the administration of arsenic and the first thing the prosecution had to do was to determine that he had died from arsenic poisoning. Thereupon two witnesses of the highest eminence in the world of Science said that he did so die, and two equally eminent said that he did not. Now, if men of Science, within whose province it is to determine such matters, cannot say positively, how can a Judge or a jury? There, then, was a case involving questions of the highest importance, and yet it is one in which the essential facts could not be proved by earthly skill. Judge, jury and counsel did not know, and apparently the doctors did not know either.

One of the difficulties in dealing with the facts at all is that very often we cannot look at them abstractly—we do not dissociate them from irrelevant surrounding circumstances. We think of the trappings, when we should be thinking of what underlies the trappings, and so follow the Philosophy of Herr Tenfelsdröckh as set forth in the pages of Sartor Resartus.

We have all, at one time or another, seen a group of boys settle points that arise in their games, such as, Who is entitled to the blue ally and who to the green? whose turn is it? and so on. I daresay these points of ownership and of precedence involve questions that may be complicated, but there is always a swift consensus of opinion among the boys that settles the matter on the spot. Why? Because the boys are going straight to the point, unembarrassed by what I have called irrelevant and collateral matters. I have sometimes thought that if we were to reduce the law problems which are presented to us in the guise of contests over many dollars, to contests over marbles, we might find them more simple, and our findings would be at any rate as equitable as if the dollars were in dispute. In the abstract a question involving millions should not be more complex than one involving the possession of a marble, but few of us can look at

things in that way and with most of us the very largeness of the issues involved tends to becloud our minds.

While, as I have indicated above, it is not probable that law in its practical workings can ever become an exact science, yet one mode of improvement seems feasible—to have all statutes carefully drawn by the most experienced hands. That would not render law certain, but it would remove some difficulties that lie in the path of the practitioner and would remove some of the odium under which he sometimes suffers.

J. H. BOWES.

WOMAN SUFFRAGE AND WOMEN SOLICITORS.

The "lords of creation (men they call)" are receiving nowadays some startling shocks which go to prove the truth of the old couplet that "they are much mistaken after all, for they are under the women's control." It took a war of the magnitude of the one that is now devastating Europe to stop, for a time, the suffragists' campaign in England. That movement is not necessarily at an end, and may break out again when people have more time to listen to them.

In this country both political parties appear to have been brazenly coquetting with the women's right leaders, and notably so in Ontario, where female suffrage is now an assured fact. In England, Lloyd George has promised the women a limited franchise, but details are not to be discussed until after the war. Without wishing to be disrespectful to politicians of either sex, anything may happen when the rickety shandrydan of party politics is driven by the nervous hands of those who have, as our grandmothers would have said, ceased to mind their own business which is to attend to their families and do their duty in that station of life to which they were born. Some say that they have in these latter days somewhat fallen from the higher estate and purer atmosphere of womanhood to the lower level and more sordid and grosser atmosphere of masculinity.

But, however, that may be, women (shaming some young men),

have done such splendid service and shewn such bravery, devotion and self-sacrifice during the war that the inclination is to give them anything they ask for. But here it may be noted that the best of these have not clamoured for the franchise.

Turning now to the legal profession, Lord Chancellor Buckmaster recently introduced in the House of Lords a bill entitled "Solicitors qualification of women bill" which was shortly discussed and passed its second reading in the Upper Chamber without a division. The Lord Chancellor, though he introduced the bill, stated that he was opposed to it and regarded the proposal as a step in the wrong direction. Lord Halsbury supported this view, but on the other hand, Lord Sumner and Lord Loreburn were in favour of it. The proposal was to admit women to the ranks of the solicitors only, the reason being that in England admission to the Bar depends not on statute but on the Benchers of the Inns of Court. The profession in England are, on the whole, strongly opposed to the measure and it may not become law, and certainly not until fuller discussion, probably at the next session of Parliament. This certainly is not an appropriate time to introduce the bill.

In this matter we are in advance (if that is the right word to use) of our brethren in England, for in several of our provinces women are both barristers and solicitors; in connection with which we notice that Miss Carthart of Moosejaw, having just passed her final law examination, will be the first lady barrister in the Province of Saskatchewan.

After all, this opening of the door of the profession to women may not prove to be a matter of much practical importance, and so far the competition of our professional sisters has not at all troubled our professional brothers. Nor do we think the right to vote being given to women will do much more in the realm of politics than cause considerable expense and troublesome detail, and perhaps be an occasional disturbing factor; but, on the other hand, we may hope this franchise may in certain matters exercise a beneficial influence.

ANIMALS ON HIGHWAYS.

Perplexity may well be felt by the ordinary person as he studies the decisions on this subject. Why, he is inclined to ask, is a farmer who drives domestic animals along, or allows them to stray on to a highway to be regarded with so much favour, and at the expense of those who may have suffered damage thereby? The classical decision of *Cox* v. *Burbidge* (13 C.B.N.S. 430) affirmed, or perhaps it would be more accurate to say reaffirmed, this immunity on the part of the owner of domestic animals unless, indeed, *scienter* can be proved. The same was laid down afresh in *Heath's Garage* v. *Hodges* (115 L.T. Rep. 129; (1916) 2 K.B. 370), a case of damage to a motor-car by a sheep which had been allowed to stray on to the highway. Despite a finding by the County Court Judge in that case that it is the natural tendency of sheep which are untended to run across or otherwise endanger vehicles in the road, the Divisional Court and the Court of Appeal both came to the conclusion that the owner of the sheep was not liable. There it was said by the Master of the Rolls that "an animal like a sheep, by nature harmless, cannot fairly be regarded as likely to collide with a motor-car, and the owner of the sheep cannot be held liable on that footing." In view of the County Court Judge's finding, the ordinary reader might think that with sheep running about a highway this would not be so unlikely a contingency as the Master of the Rolls imagined; and in this view he would find support in the decision of the Divisional Court in the case of *Turner* v. *Coates* (*post*, p. 77) where the owner of an unbroken colt, which was being driven along a highway in the dark and collided with and injured a cyclist, was held liable on the ground that in the case of an unbroken cold such an acoident was likely to happen. This may be, and we think it is, excellent sense, but it seems hard to reconcile with *Heath's Garage* v. *Hodges* (*supra*). The rule that in the case of an ordinary domestic animal the owner is not liable for such an accident is qualified by this decision, and seems now only to apply where the animal has reached years of discretion! —*The Law Times.*

VENDOR AND PURCHASER—CONTRACT BY LETTERS.

The question whether certain letters amount to a contract for the sale of land within the Statute of Frauds is often a difficult one. One of the leading cases on the point is *Hussey* v. *Horne-Payne* (41 L.T. Rep. 1; 4 App. Cas. 311). There Earl Cairns, L.C., referring to a contract by letters, thus laid down the law: "It is one of the first principles applicable to a case of the kind that where you have to find your contract, or your note, or your memorandum of the terms of the contract, in letters you must take into consideration the whole of the correspondence which has passed." That, however, was only a dictum, and must be read with reference to the fact that in that case there were, prior to the date of the two letters which were relied upon as satisfying the Statute of Frauds, certain terms which had been discussed, but had not been settled between the parties. In *Bristol, Cardiff, and Swansea Aerated Bread Company* v. *Maggs* (62 L.T. Rep. 416; 44 Ch. Div. 616) Lord Justice Kay (then Mr. Justice Kay) followed and approved of that dictum, observing that it obviated the danger of the Statute of Frauds being used as a trap to catch an unwary vendor or purchaser and bind him by a contract when the real intention was negotiation only. But in *Bellamy* v. *Debenham* (63 L.T. Rep. 220; (1891) 1 Ch. 412; affirmed on appeal, for other reasons, 64 L.T. Rep. 478; (1891) 1 Ch. 412) Mr. Justice North considered that the remarks of Mr. Justice Kay in *Bristol, Cardiff, &c., Company* v. *Maggs* went too far, and Mr. Justice North decided that, though when a contract is contained in letters the whole correspondence should be looked at, yet if once a definite offer has been made and it has been accepted without qualification, and it appears that the letters of offer and acceptance contained all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiations. When once it is shewn that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at. The point came before Mr. Justice Sargant in the recent case of *Perry* v. *Suffields Limited*

(115 L.T. Rep. 4; (1916) 2 Ch. 187), and he considered that *Bellamy* v. *Debenham* was valuable on the question of law as correcting the too sweeping remarks of Mr. Justice Kay in *Bristol, Cardiff, &c., Company* v. *Maggs*, and decided that when once it is shewn that there is a complete contract by letters, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at. That decision was affirmed by the Court of Appeal (Lord Cozens-Hardy, M.R., Pickford, L.J., and Neville, J.), who approved of the criticism of Mr. Justice North in *Bellamy* v. *Debenham* upon the observations of Mr. Justice Kay in *Bristol, Cardiff, &c., Company* v. *Maggs*. Both Mr. Justice Sargant and the Court of Appeal referred with approval to the law thus laid down in Fry on Specific Performance, par. 551: "The effect of subsequent letters may perhaps be thus stated. If the subsequent correspondence leads to the conclusion that, at the date of the letters relied on as the memoranda of the contract, there was no contract in fact, then the plaintiff must fail; if, on the other hand, the whole evidence shews that at that date there was a consensus between the parties, upon the terms expressed in the letters relied upon, then the subsequent correspondence, unless amounting to a new contract, or an agreement for rescission, can have no effect upon the existence of the contract."—*The Law Times*.

MISTAKE OF LAW—OVERPAYMENT.

It is often stated that money voluntarily paid under mistake of law cannot be recovered. There is no doubt, however, that the Court has power to relieve against mistakes in law, as well as against mistakes in fact. But, as pointed out by Lord Justice Turner in *Stone* v. *Godfrey* (5 De G.M. & G. 90), when parties come to the Court to be relieved against the consequences of mistakes in law, it is the duty of the Court to be satisfied that the conduct of the parties has been determined by those mistakes, otherwise great injustice may be done. That principle was

approved of by Lord Justice Mellish in *Rogers* v. *Ingham* (35 L.T. Rep. 667; 3 Ch. Div. 357), where he refers to it and explains it thus: "That is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it." The principle was also followed and applied by Lord Justice Stirling (then Mr. Justice Stirling) in *Allcard* v. *Walker* (74 L.T. Rep. 487; (1896) 2 Ch. 369). As long ago as *Livesey* v. *Livesey* (2 Rus. 3) it was decided by the then Lord Chancellor (affirming a decision of the Master of the Rolls) that an executrix who had, by mistake, made payments in respect of an annuity for two years before A. attained twenty-one was entitled to retain them out of the future payments of the annuity. But in *Re Horne*; *Wilson* v. *Cox Sinclair* (92 L.T. Rep. 263; (1905) 1 Ch. 76) Lord Justice Warrington (then Mr. Justice Warrington) decided that, where a trustee, who was himself one of the beneficiaries, had inadvertently overpaid the other beneficiaries their shares of income, and died before any adjustment had been made, the executors of such deceased trustee were not entitled to recover from the other beneficiaries the amount so overpaid or to have accrued or future income impounded till the shares were equalised, as their testator himself was the person responsible for the mistake that had been made. In *Re Ainsworth; Finch* v. *Smith* (113 L.T. Rep. 368; (1915) 2 Ch. 96) Mr. Justice Joyce, while not disapproving of the decision in *Re Horne*, thought that the judgment therein went beyond anything required for the purpose of the decision. In *Re Ainsworth*, where executors had paid the legacy duty payable in respect of a life interest out of a wrong fund, the decision was that what had in this way been overpaid to the tenant for life must, upon all proper adjustments being made, be retained out of future payments of her income. The point has recently come before Mr. Justice Neville in *Re Musgrave; Machell* v. *Parry* (115 L.T. Rep. 149). There the testator gave certain annuities, which he directed to be paid "without deduction." The trustees, by mistake, paid them for some time without deducting income tax. Mr Justice Neville held that this was not in the ordinary sense a mistake of public law, but an

honest, and not unnatural, mistake of construction, and that the trustees might recoup themselves by deducting the amounts so overpaid from future instalments. In the course of his judgment he said: "Since I have known anything of the Courts of Equity it has been, in my opinion, the practice of the Court when administering the estate of a deceased person, in cases where the trustees have under an honest mistake overpaid one beneficiary, in the adjustments of the accounts, so to speak, between the trustees and the *cestuis que trust*, to make allowance for the mistake, and to hold that the trustee may, so far as possible, be recouped the money which he has so inadvisedly paid," words which, we think, accord with the experience of, and represent the views of, the profession generally.—*The Law Times.*

ORDERS DISMISSING ACTIONS—ONTARIO.

In September last, a regulation was made by Meredith, C.J.O., and Middleton and Kelly JJ., whereby it was directed that "Orders made in Chambers dismissing actions shall be entered as orders and not as judgments." In the case of *Gilbert* v. *Gosport*, 1916, 2 Ch. 587, 115 L.T. 760, it has recently been decided by Sargant, J., that an order dismissing an action for want of prosecution is a judgment, and the learned Judge is of the opinion that there is no difference between an order dismissing an action for want of prosecution, and a judgment obtained on default of appearance by the plaintiff at the trial.

If this is a correct view of the nature of such orders, then it might be well to consider whether, in order to prevent any misconception as to their nature and effect, it would not have been better to have directed that all such orders should be drawn up and entered as "judgments," instead of as "orders," and particularly for the reason that judgments are entered in one set of books of the Court, and orders in another set of books, and it is obviously desirable that all judgments should be entered in the same set of books.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ILLEGITIMACY—CORROBORATION—EVIDENCE OF OPPORTUNITY—35-36 VICT. c. 65, s. 4—(R.S.O. c. 154, s. 2 (2)).

Burbury v. *Jackson* (1917) 1 K.B. 16. This was an application against the putative father of an illegitimate child, and the sole question was whether proof of the defendant having had an opportunity for illegitimate intercourse with the complainant was sufficient corroboration under 35-36 Vict. c. 65, s. 4, (see R.S.O., c. 154, s. 2 (2)), and it was held by a Divisional Court (Lord Reading, C.J., and Ridley, and Low, JJ.) that it was not.

CRIMINAL LAW—EVIDENCE OF ACCOMPLICE—CORROBORATION—CROSS-EXAMINATION OF PRISONER AS TO ANOTHER OFFENCE—CRIMINAL EVIDENCE ACT, 1898 (61-62 VICT. c. 36) s. 1—(R.S.C. c. 145, s. 5).

The King v. *Kennaway* (1917) 1 K.B. 25. This was a prosecution for forgery of a will, and on the trial two accomplices were called as witnesses for the prosecution who deposed that the will was forged by the accused, in pursuance of a scheme whereby they were to endeavour fraudulently to obtain an advance from third parties to a legatee named in the will on the faith of his legacy; and they also deposed that one of them was to be named legatee and the executor, and that the accused told them he objected to being named executor, because he had forged a will under a similar scheme some years before, on which occasion he played the part of the executor, and that if he did it again he might be suspected. The accused gave evidence in his own defence and denied the accomplice's statement as to the earlier forgery. In cross-examination counsel went into details as to the earlier forgery and asked questions tending to shew that he had committed it. The question raised before the Court of Criminal Appeal (Lord Reading, C.J., and Darling, and Avory, JJ.) was whether the cross-examination was rightly made, and admitted, and the Court held that it was, and that it might afford corroboration of the evidence of the accomplices, and consequently it was relevant to the issue being tried, and was not open to objection under the Criminal Evidence Act, 1898, s. 1, (see R.S.C. c. 145, s. 5).

SHIP—CHARTERPARTY — DEMURRAGE—PERIOD OF DEMURRAGE NOT SPECIFIED—DETENTION OF SHIP BEYOND A REASONABLE TIME—DAMAGES.

Inverkip S.S. Co. v. *Bunge* (1917) 1 K.B. 31. This was an action to recover damages for detention of a ship, in lieu of demurrage, in the following circumstances. The charterparty provided for the payment of demurrage at a specified rate if the ship should be detained any longer than five days, but did not specify any limit to the period of detention. After the termination of the lay days, the charterers had not commenced to load the vessel, whereupon the shipowners gave notice that they would no longer accept payment of the specified rate of demurrage, but would claim damages. The vessel having been detained beyond a reasonable time, the action was brought by the shipowners to recover damages for the detention, but Sankey, J., who tried the action, held that the plaintiffs could only recover for demurrage at the specified rate.

BANKRUPTCY — COMPANY REGISTERED IN ENGLAND — BRITISH DIRECTORS—ALIEN ENEMY SHAREHOLDERS—ENGLISH COMPANY CARRYING ON BUSINESS IN ENEMY COUNTRY—RIGHT OF PROOF.

Re Hilckes (1917) 1 K.B. 48. This was a bankruptcy proceeding. The bankrupt was indebted to a registered English Company, all of the directors of which were English, and the bulk of the capital thereof was held by British subjects, though a considerable number of shares were held by Germans. After the war began, the bankrupt, who was a German, was interned in England, and was adjudicated a bankrupt; the company carried on its business in a rubber plantation situate in what, at the beginning of the war, was a German colony, and the question was whether in such circumstances the company was entitled to prove its claim against the bankrupt. Horridge, J., held that the company was at the time of the outbreak of the war carrying on business in an enemy country, and therefore, according to the sixth proposition of Lord Parker's summary of the law in *Daimler Co.* v. *Continental Tyre & Rubber Co.* (1916) 2 A.C. 307, 346, must be regarded as an alien enemy; but the Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.) held that the mere fact that a British company did business up to the time of the outbreak of the war in an enemy country, through a properly appointed agent, did not constitute the com-

pany an alien enemy, and, therefore, that it was entitled to prove its claim.

SHIP—BILL OF LADING—EXCEPTIONS—GENERAL SHIP—LOADING AT DIFFERENT PORTS—RIGHT TO RE-STOW CARGO—DAMAGE OCCASIONED IN COURSE OF RE-STOWING.

Bruce Marriott Co. v. *Houlder Line* (1917) 1 K.B. 72. This was an action by owners of a part of a cargo, for damages occasioned thereto in the following circumstances. The cargo in question was shipped on a general ship which carried cargo for various ports. She took on part of her cargo at Antwerp, and then proceeded to London, and took on the plaintiff's cargo. The bill of lading therefor excepted, *inter alia*, damages arising from breakage. The vessel then proceeded to Newport to take on more cargo. It was found necessary for the safe voyage of the ship that two large cylinders of the plaintiff's cargo should be taken out of the hold where they have been placed, and restowed in another hold. For this purpose they were temporarily placed on the quay, and while there were damaged. The evidence shewed that this method of dealing with the cargo in case of a general ship was quite usual. Rowlatt, J., who tried the case, thought that the defendants were not entitled to take the cylinders out of the hold for the purpose of re-stowing them, therefore, that the defendants were not protected by the exception in the bill of lading; but the Court of Appeal (Eady, and Bankes, L.JJ., and Lawrence, J.) unanimously reversed his decision, and the action was dismissed.

CRIMINAL LAW—HIGH TREASON—AIDING THE KING'S ENEMIES—ADHERENCE WITHOUT THE REALM—TREASON ACT, 1351 (25 EDW. 3, STAT. 5, C. 2).

The King v. *Casement* (1916) 1 K.B. 98. This will probably hereafter constitute one of the leading cases on the subject of high treason. The accused was indicted under the Treason Act of 1351. His alleged offence being, that being a British subject he had gone to Germany in time of war, and there endeavoured to induce certain subjects of His Majesty, there prisoners of war, to join the armed forces of the enemy. It was contended that this act having been committed out of the realm was not treason within the Act, and not triable in England, but the King's Bench Division (Lord Reading, C.J., and Avory, and Horridge, JJ.) and the Court of Criminal Appeal (Darling, Bray, Lawrence, Scrutton, and Atkin, JJ.) unanimously agreed that the offence

was within the Act, and triable in England; and that the acts of which the accused had been guilty, were an adherence to the King's enemies, and also a giving aid and comfort to them.

CONTRACT — CONDITION—SUSPENSION OF DELIVERY—PREVENTING OR HINDERING DELIVERY—WAR—SHORTAGE OF SUPPLY —RISE IN PRICE.

Wilson v. *Tennants* (1917) 1 K.B. 208. This was an action to enforce a contract for the supply of magnesium chloride. The contract was subject to a condition that deliveries might be suspended pending any contingencies beyond the control of the sellers or buyers (such as war), causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture, or delivery of the article. Owing to the war there was a shortage of supply, and the price rose, and the defendants claimed under the clause above mentioned a right to suspend deliveries during the war. Low, J., who tried the action, gave effect to this contention, but the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford, L.J., and Neville, J., the latter dissenting), held that the mere shortage of supply, which did not in fact prevent or hinder the delivery of the goods, was not within the condition, and that the condition referred to a physical, or legal prevention, and not to an economic unprofitableness, arising from a rise in price.

LANDLORD AND TENANT—LEASE UNDER SEAL—OVERHOLDING TENANT—LIABILITY OF TENANT OVERHOLDING—RIGHT OF LESSOR TO SUE OVERHOLDING TENANT ON EXPRESS COVENANTS IN LEASE—CONVEYANCING ACT, 1881 (44-45 VICT. C. 41) S. 10—(R.S.O. C. 155, S. 5).

Blane v. *Francis* (1917) 1 K.B. 252. This was an action by an assignee of the reversion against an overholding tenant for breach of a covenant to repair. The covenant was contained in the lease under which the lessee had entered. It was contended that under the Conveyancing Act, 1881, s. 10 (see R.S.O. c. 155, s. 5) the tenant, notwithstanding the lease had expired, still remained liable under the covenants in the lease, and that the plaintiff, as assignee of the reversion, was entitled to recover for the breach thereof; but the Court of Appeal (Eady, and Bankes, L.JJ., and Lawrence, J.), agreed with the Divisional Court that the Act did not apply to a lease not in writing, and that the plaintiff, as assignee of the reversion, was not entitled

to sue the overholding tenant for breaches of an express covenant in the expired lease, nor could he demand that the tenant should execute a lease so as to enable him to sue upon that covenant. The action therefore failed. It should be noted that the defendant paid into Court a sum sufficient to satisfy the breach of her implied covenant to keep the premises wind and water tight, which was accepted by the plaintiff as sufficient.

PRIZE COURT—NEUTRAL VESSELS—CONTRABAND CARGOES—SHIPOWNER'S CLAIM TO FREIGHT.

The Jeanne (1917) P. 8. The simple point decided by Evans, P.P.D., in this case is, that the owners of neutral vessels carrying contraband cargoes which have been taken in prize and condemned, have no claim which will be recognised in the Prize Court for freight in respect of such cargoes except as a matter of grace or discretion.

SALVAGE—FREIGHT SUBSEQUENTLY EARNED ADDED TO VALUE OF SALVED VESSEL.

The Kaffir Prince (1917) P. 26. This was a claim for salvage. The vessel salved was on her way in ballast to an English port under a charter party to take a cargo of coal to Alexandria. By reason of being salved she was enabled to earn the freight for carriage of the coal, and Evans, P.P.D., held that the freight thus earned must be added to the value of the ship, for the purpose of computing the amount to be paid for salvage.

PRIZE COURT—PASSING OF PROPERTY IN TIME OF WAR—GOODS SENT BY PARCELS POST FROM ENEMY COUNTRY—SEIZURE UNDER REPRISALS ORDER IN COUNCIL OF MARCH 11, 1915.

The United States (1917) P. 30. This was a proceeding in the Prize Court in respect of certain parcels seized on board the ship the United States under the above-mentioned Order in Council. The vessel was a neutral Dutch vessel: and the parcels in question contained goods made in Germany, and intended for customers in America; the goods having been bought and paid for, before the passing of the Order in Council. It was contended on behalf of the purchasers that the goods when seized were neutral goods, as the property in them passed to the purchasers when the goods left the German factories, from which they were sent. Evans, P.P.D., held that in time of war goods shipped from an enemy country to a neutral country, or from a neutral

to an enemy country, are, when captured, to be regarded as enemy property, and that they, or their proceeds if sold, must be detained till the conclusion of peace.

PRIZE COURT—COMMERCIAL DOMICIL—GOODS OF ENEMY FIRM IN NEUTRAL COUNTRY—ENEMY PARTNERS—NO PARTNER RESIDENT IN NEUTRAL COUNTRY—ENEMY PROPERTY.

The Hypatia (1917) P. 36. This is another case of prize. Goods belonging to a German firm carrying on business in Buenos Aires were shipped before the war on a British ship for carriage to Hamburg. None of the members of the firm was domiciled in Buenos Aires, or any other neutral country. The cargo was seized as prize, and this was a suit for its condemnation. Evans, P.P.D., held that although a subject of a belligerent State may acquire a domicil in a neutral State which will protect his goods captured at sea from condemnation as prize, residence in the neutral State is essential, and that a mere commercial domicil, unaccompanied by actual residence, will not suffice, therefore the goods in question were condemned.

PRIZE COURT—"GOODS" OR "COMMODITIES"—GERMAN GOVERNMENT BONDS—SEIZURE FROM LETTER MAIL—REPRISALS ORDER IN COUNCIL OF MARCH 11, 1915.

The Frederik VIII. (1917) P. 43. In this case some German Government Bonds sent by a bank in Berlin to Copenhagen to be transmitted to a bank in Chicago, were sent by letter mail from Copenhagen to Chicago, and were captured at sea in course of transmission. The simple question was whether the bonds were "goods" or "commodities" within the Order in Council above referred to, and Evans, P.P.D., held that they were.

WILL—CONSTRUCTION—GIFT TO NEPHEWS AND NIECES AND THEIR CHILDREN—INCLUSION OF CHILDREN OF ILLEGITIMATE SISTER.

In re Helliwell, Pickles v. *Helliwell* (1916) 2 Ch. 580. The question in this case was whether certain illegitimate relatives of a testator were included with legitimate relatives in a gift of residuary estate. The gift in question was in favour of the testator's nephews and nieces, and the issue of such of them as were dead, and was followed by a declaration that John Feather, a son of "my sister Mary Wright" and William Hey the "son" of my brother John Helliwell, shall be entitled to share equally with my other nephews and nieces. His sister Mary Wright was

in fact illegitimate, and William Hey was in fact an illegitimate son of John Helliwell. Besides Mary, the testator had also an illegitimate sister named Sarah, who had died leaving legitimate children, and the question was whether these children were entitled to participate. Sargant, J., held that the will contained sufficient indication of the testator's intention to include them, as well as the legitimate relatives, and so decided.

ACTION AGAINST PUBLIC AUTHORITY—DISMISSAL FOR WANT OF PROSECUTION—ORDER WHETHER A "JUDGMENT"—COSTS—PUBLIC AUTHORITIES PROTECTION ACT, 1893 (56-57 VICT. c. 61), s. 1 (*b*)—(R.S.O. c. 89, s. 13 (2)).

Gilbert v. *Gosport & A.U. District Council* (1916) 2 Ch. 587. This was an action against a public authority which was dismissed for want of prosecution, and the simple question was whether the costs should be paid as between solicitor and client. The action was brought in respect to an alleged trespass by the defendants on land claimed to belong to the plaintiff, but over which on behalf of the public the defendants claimed a right of way, and the question turned upon whether the order dismissing an action, was a "judgment." This point could hardly arise under R.S.O. c. 89, s. 13 (2), Sargant, J., held that an order dismissing an action is equivalent to a judgment for the defendants, and that the defendants were entitled to costs as between solicitor and client. Notwithstanding the recent Regulation of 25th September, 1916, of the Supreme Court of Ontario, providing that orders dismissing actions are to be entered as orders, and not as judgments, the legal effect of such orders is probably not affected

COPYRIGHT—UNIVERSITY EXAMINATION PAPERS—ORIGINAL LITERARY WORK—INFRINGEMENT—INJUNCTION—COPYRIGHT ACT, 1911 (1-2 GEO. V. c. 46), s. 1 (1), s. 2, SUB-S. 1 (*i*); s. 5, SUB-S. 1 (*b*); s. 35 (1).

University of London Press v. *University Tutorial Press* (1916) 2 Ch. 601. In this case Peterson, J., held that examination papers set for an university examination are an "original literary work" within the meaning of the Copyright Act, 1911 (1-2 GEO. V. c. 46), s. 1 (1), and that the copyright vested in the examiners who composed them; and that the examiners were not "in the employment" of the University under" a contract of service within" the meaning of s. 5, sub-s. 1 (*b*); but as the Examiners were appointed subject to a condition that any copyright in the examination papers should belong to the University, the examiners were

bound to assign their copyright to the University, or to whom it might direct; and the University having assigned its rights to the plaintiff company, the plaintiff company was equitably entitled to the copyright; and two of the examiners having been joined as co-plaintiffs, it was held that the plaintiff company was entitled to an injunction to restrain the infringement of the papers set by the two examiners who were co-plaintiffs; the defendants having failed to bring themselves within the protection of s. 2, sub-s. 1 (*i*).

LIFE ASSURANCE POLICY—ASSIGNMENT SUBJECT TO CONDITION OF ASSIGNOR PREDECEASING ASSIGNEE—NO CONSIDERATION—TESTAMENTARY DISPOSITION—INVALIDITY.

In re Williams, Williams v. *Ball* (1917) 1 Ch. 1. In this case the facts were that an owner of a life assurance policy on his own life, gave it to his housekeeper with the following signed indorsement thereon, "I authorise" (*naming her*) "my housekeeper and no other person to draw this insurance in the event of my predeceasing her, this being my sole desire and intention at time of taking this policy out, and this is my signature." The assignor paid the premiums until his death, which took place in the lifetime of the assignee. There was no consideration for the assignment, and the question was therefore whether, in the circumstances, it was a valid gift, and Ashbury, J., who tried the action, held that the gift was inoperative, on the ground that the assignment contained no present words of gift, and being without consideration, and conditional, did not pass the chose in action. The Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.) affirmed his decision, but on the ground that the assignment was an incomplete gift, and was either a revocable mandate, revoked by the death of the assignor; or if intended to take effect on his death, it was a testamentary document not validly executed.

REAL ESTATE—CONVERSION—OPTION TO PURCHASE—EXERCISE OF OPTION—DEATH OF PURCHASER INSOLVENT—INABILITY TO CARRY OUT PURCHASE PURSUANT TO OPTION—RE-ENTRY OF VENDOR.

In re Blake, Gawthorne v. *Blake* (1917) 1 Ch. 18. This was a case to determine whether or not there had been a conversion of realty into personality in the following circumstances. At the date of the testator's death in 1897 he was owner in fee of certain real estate which was the subject of a building agreement

containing an option to the proposed lessee to purchase the reversion in fee. After the testator's death the proposed lessee, having become entitled to a lease, in 1899 gave notice of exercising his option to purchase the fee; but he died in 1899 insolvent, and without having carried out the purchase, and the testator's trustees had subsequently, pursuant to the terms of the agreement, re-entered on the premises. By the testator's will the testator's residuary real and personal estates were disposed of to different persons, and consequently it became of moment to determine whether or not there had been a conversion of the realty included in the agreement into personalty, by reason of the notice to exercise the option, and Eve, J., held that the giving of the notice of exercising the option worked a conversion, and the subsequent failure to carry out the purchase, and the re-entry by the trustees of the will, had not the effect of reconverting the property into realty as against the legatees of the personal estate.

WILL—BEQUESTS TO CHILDREN—ADVANCES TO SON—DIRECTION IN CODICIL TO BRING INTO HOTCHPOT ADVANCES APPEARING IN BOOKS—ENTRIES BEFORE AND AFTER CODICIL.

In re Deprez, Henriques v. *Deprez* (1917) 1 Ch. 24. By the will in question dated in 1899, and a codicil dated in 1909, the testator made bequests to his children, and provided by the codicil that the advances to his son appearing in his books of account should be brought into hotchpot. The testator died in 1915 and it was then found that his books contained entries, made before and after the codicil, of advances to his son. Neville, J., who tried the action, held that the entries of advances made prior to the codicil were incorporated in the will, and were conclusive, but the subsequent entries were not receivable as part of the will, or as evidence, and as to them there must be an inquiry.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—PARTIAL RELEASE OF RESTRAINT ON ANTICIPATION BY CESTUI QUE TRUST WHILE DISCOVERT—DIRECTION TO TRUSTEES.

In re Chrimes, Locovich v. *Chrimes* (1917) 1 Ch. 30. This case, we believe, is one of first impression, at all events no previous authority is cited on the point in question. The facts were simple. The plaintiff was entitled to a reversionary share under a will bequeathed to her while a spinster, but subject to a restraint against anticipation in case she married. She subsequently

married, but before she married, she executed a deed poll, whereby she declared that the said reversionary share should, in the event of her marriage, belong to her for her separate use, and that for the purposes, and subject to the conditions therein mentioned, she should have full power to dispose of, or charge the said share by way of anticipation or otherwise as she might think fit, but, except as therein provided, nothing therein contained should prejudice the continuance of the said restraint. This deed was duly communicated to the trustees of the will; after her marriage three mortgages were made by her pursuant to the conditions of the deed. This was a summary application to determine whether the mortgages were valid, and whether the plaintiff had power to make any further mortgages for the purposes declared by the deed poll. Sargant, J., held that the deed was valid and operated by way of direction to the trustees, and thus amounted to a complete and effectual transfer of the plaintiff's share upon a new and modified trust, and that for the purposes, and subject to the conditions imposed by the deed poll, she had power to deal with her share by way of anticipation during coverture.

LIEN—PRINCIPAL AND AGENT—INDEMNITY FOR LIABILITY FOR DAMAGE FOR ACTS DONE BY AGENT FOR PRINCIPAL—COLLIERY —SUBSIDENCE — EQUITABLE LIEN — POSSIBLE FUTURE DAMAGES.

Dyson v. *Peat* (1917) 1 Ch. 99. In this case the plaintiffs were the surviving executrix and trustees of the estate of a lessee of certain coal mines, subject to a liability to indemnify owners of the surface in case of subsidence from working the mines. This lease was assigned to a company who undertook to indemnify the assignor and his estate against liability under covenants in the lease, and the company charged its undertaking with the performance of the covenant for indemnity, and authorised Dyson, the executrix, in case of default in performing the covenant, to appoint a receiver and manager of the company; the company having made default, the defendant Peat was appointed by Dyson receiver and manager of the business, and he carried on the colliery, and after satisfying the expenses, and claims for subsidence actually made, there remained a balance in his hands to which the plaintiffs claimed to be entitled, but which claim was resisted, on the ground that further subsidences might take place for which the defendant would be liable, and he claimed to retain the balance to indemnify him against such possible future liabilities; but Eve, J., held that he had no lien on the

money in his hands for that purpose, and he ordered payment of the balance to the plaintiffs, without any provision for indemnity to the defendant against future liabilities. *Sed quære* ought not the plaintiffs to have been required to give the defendant a bond, on the principle that he who seeks equity must do equity?

LANDLORD AND TENANT—COVENANT TO INSURE AGAINST "LOSS AND DAMAGE BY FIRE"—INSURANCE AGAINST FIRE "EXCEPT WHEN CAUSED BY ENEMY."

Enlayde v. *Roberts* (1917) 1 Ch. 109. This was an action by a lessee against his lessor, for breach of a covenant to insure the demised premises against "loss or damage by fire," and to expend the money received from the insurance in the restoration of the premises. The defendant had insured the premises against fire, but the policy excepted fire occasioned by a foreign enemy—invasion by foreign enemy—and military or usurped power. The premises had been destroyed by fire occasioned by an enemy bomb. The insurance which had been effected against fire did not cover the loss by reason of the exception, and the defendant claimed that there was a custom that policies against fire should except losses occasioned by enemies. Sargant, J., who tried the action, held that the words "loss or damage by fire" in the lease must be construed in their strict and primary, and not in their secondary, sense, and that the lessor was liable on her covenant for the loss which had occurred. He also was of the opinion that the fact that the loss which took place had been occasioned by circumstances not in the contemplation of either party when the covenant was made, was immaterial.

Correspondence.

LORD'S JUSTICES.

The Editor, CANADA LAW JOURNAL:

SIR,—I notice in your issue for January a discussion of the propriety of the expression "Lords Justices."

There seems to me no doubt of its propriety, but none of the reasons given appear to me to be conclusive. It does not depend on legal authority, statutory or otherwise, nor yet on auy technical

rules of grammar. It cannot be argued that the form of the expression is correct, or incorrect, because we do, or do not, say "Lords Chancellors" or "Chiefs Justices." As a statute cannot determine what is good English, neither can it be determined by analogy to the structure of similar expressions. We must be guided by the mental conception imparted by the expression. The "Lords Justices" are a body of men created for the purpose of sitting as a body, or a certain number of them as a body, for a certain purpose. We say "their Lordships decided" so and so. If asked by a layman to say more definitely who decided so and so, we should answer, without thinking of the name applied by statute, in language indicating that a body of men styled Lords—not the peers—but the Lords "Justices" decided so and so, the appellation "Lords" being the most prominent word and indicating that they were one body, the term "justices" being added when the position and title were created, to indicate what Lords as a descriptive appellation. We say "Lords Commissioners" for the same reason, that is, to satisfy the mental conception of one body of "Lords" acting as Commissioners of the Great Seal, and no rule of grammar as to the plural of compound words or any statute, affects the question, or is ever thought of. We say "Lord Chancellors" because we think of them as isolate individuals each styled "Lord Chancellor," the word "Chancellor" being the principal substantive word, and there being no two "Lord Chancellors" at once, no body of "Lords Chancellors." We say "Chief Justices" for the same reason, and though there may be more than one in existence at the same time there is no body of "chiefs." We say "Masters of the Rolls" though there is only one at a time—no body like "Lords Justices"—because the mental conception is of a "Master" of something, referred to as "the Rolls," and "of the Rolls" is thought of as descriptive, and not like "Chancellor" as the distinctive part of his title. Besides, euphony would not permit us to pluralise "The Master of the Roll" as one word or appellation. The case is the same in both respects with "Barristers-at-law." No technical rules of grammar or the authority of any statutes applies to any of these questions.

The statute says "Lords Justices" because it is right for the above reasons. It is not because the statute uses the expression in that form that it is right.

Edmonton, March 6, 1917. A.S.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

B.C.] [Feb. 6.

BOYD v. ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND ATTORNEY-GENERAL FOR ONTARIO.

Succession duties—Partnership property—Owners not domiciled in province — Interest of deceased partner — R.S.B.C. 1911, c. 217, s. 5.

By sec. 5 of the Succession Duty Act of British Columbia, R.S.B.C. 1911, ch. 217, on the death of any person his property in the province "and any interest therein or income therefrom . . . passing by will or intestacy" is subject to succession duty whether such person was domiciled in the province or elsewhere at the time of his death. M.B. and his brother were partners doing business in Ontario and owning timber limits in British Columbia. The firm had no place of business nor man of business in that province and never worked the limits. The partnership articles provided: "8. If either partner shall die during the continuation of the partnership his executors and administrators shall be entitled to the value of his share in the partnership assets. 9. On the expiration of such partnership a valuation of the assets should be made and after providing for payment of liabilities the value of such property, stock and credits shall be divided equally between the partners, etc." M.B. having died while the partnership existed, his share in the partnership assets passed by his will to executors. The Province of British Columbia claimed that his interest in the timber limits was subject to succession duty.

Held, Davies and Anglin, JJ., dissenting, that under the terms of the articles of partnership M.B., at the time of his death, had an interest in the land in British Columbia which passed by his will and such interest was subject to duty under sec. 5 of the B.C. Succession Duty Act.

Held, also, that the imposition of the duty, if taxation, was "direct taxation within the province" and within the competence of the Legislature of British Columbia.

Appeal dismissed with costs.

Lafleur, K.C., and *David Henderson*, for appellants.

J. A. Ritchie, for the Attorney-General of British Columbia.

Wallace Nesbitt, K.C., for the Attorney-General of Ontario.

Ont.] [Feb. 6.

TORONTO SUBURBAN RAILWAY CO. v. EVERSON.

Expropriation—Railways—Date of valuation of lands—Deposit of plan—Notice—Benefit to lands not taken—Set-off—Excessive compensation—Appeal—6 Edw. VII., c. 30 (Ont.)—3 & 4 Geo. V., c. 36 (Ont.)

Where the expropriation of land is governed by the provisions of the Ontario "Railway Act" of 1906, the date for valuation is that of the notice required by sec. 68 (1). It is the same under the Act of 1913, if the land has not been acquired by the railway company within one year from the date of filing the plan, etc. The compensation for the land expropriated should not be diminished by an allowance for benefit by reason of the railway to the lands not taken, the Ontario "Railway Acts" making no provision therefor.

On appeal in a matter of expropriation the award should be treated as the judgment of a subordinate Court subject to re-hearing. The amount awarded should not be interfered with unless the Appeal Court is satisfied that it is clearly wrong, that it does not represent the honest opinion of the arbitrators, or that their basis of valuation was erroneous.

Where the land expropriated is an important and useful part of one holding and is so connected with the remainder that the owner is hampered in the use or disposal thereof by the severance, he is entitled to compensation for the consequential injury to the part not taken. *Holditch* v. *Canadian Northern Railway Co.* (50 Can. S.C.R. 265; (1915) A.C. 536) distinguished.

To estimate the compensation for lands expropriated, the arbitrators are justified in basing it on a subdivision of the property if its situation and the evidence respecting it shew that the same is probable.

Held, per Fitzpatrick, C.J., and Anglin, J., that to prove the value of the lands expropriated, evidence of sales between the date of filing the plans and that of the notice to the owner is admissible and also of sales subsequent to the latter date if it is proved that no material change has taken place in the interval.

Brodeur, J., dissenting, held that the damages should be reduced; that the arbitrators should have considered only the market value of the lands established by evidence of recent sales in the vicinity.

Appeal dismissed with costs.

R. B. Henderson and *O'Connor*, for appellants. *Tilley*, K.C., for respondent.

Ont.] BOOTH v. LOWERY. [Feb. 19.

Negligence—Driving lumber—Rights on navigable waters—River improvements—Contract with Crown—Rights of contractor—Reckless driving—"Rivers and Streams Act" (Ont.)—B.N.A. Act, 1867, ss. 91 (10), 92 (10).

In 1910, Parliament voted money for "Montreal River Improvements above Latchford" and the Crown, through the Minister of Public Works, gave a contract to L. in connection with the work. In performance of the work L. placed a cofferdam on each side of the river, leaving an opening between them some 200 feet wide. In the spring of 1911, the cofferdam on the north side was covered by three feet of water and the logs of B., being driven down through the opening, came against a pier a few hundred feet below, forming a jam, the rear of which was over the cofferdam. The breaking of the jam, in the ordinary mode, caused the logs to press more heavily on the cofferdam and it was destroyed.

Held, Fitzpatrick, C.J., and Duff, J., dissenting, that B. was responsible for the injury so caused; that with more care in driving the formation of the jam might have been avoided; that, if breaking the jam in the ordinary way was likely to cause damage, another mode should have been adopted, even if it would cause delay and greater expense; and that the employees of B. acted with a wilful disregard of the contractors' rights and caused "unnecessary damage."

Held, per Davies, Anglin and Brodeur, JJ., that the rights of lumbermen under the Ontario "Rivers and Streams Act" (pre-confederation legislation), are not subordinate, but equal to those of persons acting for the Dominion Government in matters respecting navigation.

Per Davies and Duff, JJ.—Anglin, J., *dubitante*. The cofferdam was a "structure" and subject to the provisions of sec. 4 of the "Rivers and Streams Act."

Per Davies and Anglin, JJ.:—Even if not a "structure," as it was placed in the river under sanction of Dominion legislation, B.'s rights were restricted practically as they would be under sec. 4.

Held, per Fitzpatrick, C.J., and Duff, J.:—A vote for "River Improvements" does not of itself authorise an interference with the rights of lumbermen under the "Rivers and Streams Act." These rights were exercised in the usual and proper manner, and as no breach of duty by B. to avoid "unnecessary damage"

was proved he could not be held liable for the damage to the cofferdam.

Judgment of the Appellate Division (37 Ont. L.R. 17), reversing that at the trial (34 Ont. L.R. 204), affirmed.

Tilley, K.C., and *Wentworth Greene*, for appellant. *McKay*, K.C., for respondent.

Ont.] [Feb. 19.

JOHN A. MARSHALL BRICK CO. v. YORK FARMERS COLONIZATION CO.

Mechanic's lien—Loan company—Agreement for sale—Advances for building—"Owner"—Request—Privity and consent—Mortgagee—R.S.C. 1914, c. 140, ss. 2 (1), (3) and 14 (2) Mechanics' Lien Act.

The owners of four lots in Toronto executed an agreement to sell them to one I., who was to make a cash deposit and undertake to build four houses on the lots, the vendors to advance $6,400 for building purposes. On completion of the houses and on receipt of the balance of price and amount of advances, the vendors to execute a deed of the lots. I. gave contracts for the building which was partly completed and $3,400 was advanced by the vendors when I. became insolvent and the vendors, under the terms of their agreement, gave notice of forfeiture and took possession of the property. Prior to this liens had been filed for labour and materials supplied and the lien-holders brought action for enforcement thereof against the vendors.

Held, affirming the judgment of the Appellate Division (35 Ont. L.R. 542), Davies and Brodeur, JJ., dissenting, that the vendors were not owners of the property according to the definition of the term "owner" in sec. 2 (*c*) of the "Mechanics' Lien Act" and, therefore, were not liable to pay for the labour and materials supplied for the building of the houses for I.

Per Anglin, J.:—To make the vendors "owners" because the work was done with their privity and consent, a direct dealing between them and the materialmen was requisite and of this there was no evidence.

By sec. 14 (2) of said Act, the vendors, under the agreement for sale, became mortgagees of the land sold with their rights as such postponed to those of the lien-holders in respect of any "increased value" given to the land by erection of the houses thereon.

Held, that, though they had refused it at a former stage of the

proceedings, the lien-holders should, if they wish, have a reference to permit of revision of their claims on the basis of the vendors being mortgagees and any amount found due to them on such reference to be set-off against the costs payable by them in the Appellate Division and on the present appeal.

Appeal dismissed with costs.

Raney, K.C., and *C. Lorne Fraser*, for appellants. *B. N. Davis*, for respondents.

Province of Ontario

FIRST DIVISION COURT—COUNTY OF WATERLOO.

REIJH v. ULROP.

Medical Act—Infringement.

The diagnosing of a disease, or the manual manipulation of bones and nerves is not, nor is the combining of them, a "practising of medicine" within the meaning of the Medical Act.

[READE, J.J., Kitchener. Feb. 8, 1917.

READE, J.J.:—The plaintiff was not, and did not, claim to be a practitioner within the meaning of the Medical Act, but charged for services rendered in diagnosing diseases and treating them by manual manipulation of the patient, but without the administering of drugs or medicine.

It does not appear upon the evidence, nor is it otherwise known to me, that what the plaintiff did or claimed to do encroached upon any of the methods adopted by the medical profession for the cure of disease, either according to the extended interpretation of the words "practicing medicine" given by some jurists, or the more contracted one requiring the use of drugs and medicines, though in my view the more contracted meaning is the proper one. I cannot understand how the intention of the legislature can be taken to extend the meaning of the words beyond their natural signification so as to enable the medical profession to adopt and confiscate from time to time new methods of restoring health resorted to by others, without the sanction of legislative enactment, nor has it anywhere been held that diagnosis alone constitutes practicing medicine, it being always

coupled for that purpose with the prescribing and administering of a remedy in accordance with the medical pharmacopœia, as in the case, for instance, of a druggist diagnosing a disease and then prescribing and selling a proposed remedy, which would clearly be an infraction of the Medical Act. Nor can I see how it can be said that, because the plaintiff coupled the diagnosis, which in itself does not constitute practicing medicine, with the application of manual treatment, which also in itself does not constitute practicing medicine, that he was therefore guilty of practicing medicine, and I do not so find. There will therefore be judgment for the plaintiff as claimed.

See *In re Ontario Medical Act*, 13 O.L.R. 501; *Regina* v. *Howarth*, 24 O.R. 561; *Regina* v. *Coulson*, 27 O.R. 59; *Queen* v. *Velleau*, 3 Can. C.C. 435; *Reg* v. *Hall*, 8 O.R. 407.

War Notes.

THE AWAKENING OF AMERICA.

On the second day of the month of April, the President of the United States read to Congress his long delayed message on the subject of the war. It was a masterly, complete and convincing vindication of the Allies and a damning arraignment of German brutality and bad faith. It was in effect taking up the gage of battle thrown down by Germany by their atrocious breaches of international law and solemn promises and disregard of the dictates of humanity, whereby they had put themselves outside the pale of civilised nations. The Senate on the 4th inst. accepted the President's message and adopted a war resolution by a vote of 82 to 6. On the 6th inst. Congress took the same action by a vote of 373 to 50. The formal document, signed by the President, under the seal of the Republic, declares that a state of war exists between Germany and the United States of America by reason of the acts of the former power and is in effect a declaration of war.

There had been a growing feeling of regret, if not of resentment, in this country, that Great Britain should be left to fight the battle of freedom and liberty, without the active co-operation of a country of the same language and largely of the same race as ourselves and which claimed preeminence as the exponent of freedom and liberty. There have been those who went so far as

to say that the land of Washington and of Lincoln had lost its soul in the mire of money and luxurious ease. But the soul was not dead, but slumbered, and now it is awake—very much awake in its activities. We are glad for their country and for ourselves and for the world at large that it is so.

It must be remembered, that there is in the United States a large native German element, wealthy and influential, which had to be reckoned with by the President, and he had in this, and in other ways not made public, great difficulties to contend with, which took tact and time to surmount; so that there is some excuse for the delay in the action which has now happily taken place. It is possible, moreover, that the presence of these disturbing elements may result in outrages and acts of violence traceable to an alien race which, by the awful malignity and cruelty they display, seem to be under the influence of satanic possession. This is to be deplored, but may be expected.

BATTLE OF ARRAS AND VIMY RIDGE.

At the fighting near Arras beginning on Easter Sunday, the Canadian divisions were given the post of honor at the storming of Vimy Ridge, and led the assualt. This strong position was captured and held. Over 12,000 German prisoners were taken and about 200 guns. The King's congratulatory message to our men reads as follows:—

"The whole Empire will rejoice at the news of yesterday's successful operations. Canada will be proud that the taking of the coveted Vimy Ridge has fallen to the lot of her troops. I heartily congratulate you and all who have taken part in this splendid achievement."

"WELL DONE, CANADA!"

The *New York Tribune* of the 11th inst. contains the following eloquent tribute to our men at the front. We take pride in what others say of those who have gone to fight for the right, but shame when we think of those who refuse to take the places of our fallen heroes:—

"Every American will feel a thrill of admiration and a touch of honest envy at the achievement of the Canadian troops about Arras on Easter Sunday and the following day.

"The glory of the Canadian fight at the Ypres salient has been too little appreciated on our side of the northern frontier. Rarely in history have troops, volunteer troops, suddenly exposed

to a flank attack, through no fault of their own, but by the collapse of their neighbours, had to bear a more terriffic blow than that which followed the first gas attack. Yet, in the midst of confusion, assailed by the appalling poison of German making, the Canadian volunteers stood and died as the British regulars had stood and died in the greater battle of Ypres, of 1914.

"And now the Canadians have swept up the famous Vimy ridge, which halted the French veterans of Foch and proved too great an obstacle for the genius of the greatest offensive fighter France has yet produced in the war. After the long months of waiting the Canadians have had their hour. They have had a chance to avenge their comrades, crucified by German brutes in Flanders; they have had the opportunity to write the name of Canada upon the war map of Europe and their imprint will be remembered—in Germany quite as much as in America.

"We shall know later at what price this achievement was accomplished, but no price will be too high, and for Canada this day of victory will have a lasting value. For Canada, too, its value will be less than for the British Empire.

"Nearly three-quarters of a million of Canadian and Australian troops have responded to the call of the British Empire, more than half of them wearing the Canadian Maple Leaf. German plotting, German scheming, the wise plans of the professors on paper and of the German soldiers on the map have been answered in the only fashion in which it is possible to speak to Germans now.

"Americans will feel a certain envy in the thought that Canada has outdistanced us in reaching the battle line, which is the frontier of our common civilization. We shall take what comfort we may from the knowledge that among the Canadian forces are a considerable contingent of citizens of the United States, an unofficial vanguard, we shall trust, of that American army which is, in due course, to take its place along the French front. They are serving in worthy company.

"No praise of Canadian achievement can be excessive. From the plains and from the mountains, from the cities and from the prairies, Canada has poured out her thousands and her hundreds of thousands; she has sent across the ocean an army greater than Napoleon ever commanded on any battlefield; her volunteer regiments have shewn that same stubborn and tenacious quality which is the glory of the British army. Canada's sons have won for liberty not merely a few square miles of French territory, but a victory which makes answer to the German idea that the

world can be reconstructed without regard to the spirit of man, merely by material force. Our entrance into the war should make a new bond between the Canadians and ourselves."

THE IMPERIAL WAR CONFERENCE.

On the 20th ultimo. the British War Cabinet, together with the representatives of the Dominions, with the exception of Australia, whose members were unable to be present, met for the first time with full executive powers and responsibility to consider the future policy of the Empire to be followed in the war and afterwards. This meeting marks a definite epoch in the history of the Empire and of its constitutional development. The result of its deliberations will be looked for with great interest.

Bench and Bar

ONTARIO BAR ASSOCIATION—PROCEEDINGS AT THE ANNUAL MEETING.

Report of Committee of Legal History.

Not the least interesting part of these proceedings was the paper read by Lieut.-Col. Ponton, Chairman of the above Committee, and Historian of the Association.

After referring to the war and the suspension of some of the matters of general interest by reason thereof, he said: "It cannot be doubted but that the history of these three great years of stress, of testing, and of revelation of power (of might and of right), will record a greater developing influence and transforming and transmitting effect upon the laws of nations and of individuals, than has been attained during even the past century of progress. The profession of the Law, that great bond of the Commonwealth and of the "larger liberties," will rise to its opportunity, and its members, whether as private citizens (sharing burdens and privileges), as Judges on the Bench (truly the men behind the Flag), or as statesmen at the helm, guiding with even keel, as they have so often done, the ship of state, may be trusted, as in the past, to do their duty for the common weal, zealously and loyally. In the relationship of the subject to the State: in the determination and the limitation of property rights and

their subordination to the general good: in the guarantees and sanctions of that international police which must preserve the world's peace after justice has been adequately vindicated and victory won; in the adaption of new conditions following the release of new forces hitherto undreamed of, there must, and will be, a profound upheaval, and the gravest solicitude for that *salus reipublicae* which has always been *suprema lex;* and every fibre that can strengthen the hand of stable government, every cement that can reinforce the unity of the community, will be needed. But no reader of history need be a pessimist, for if we, who worship at the shrine of law, are true to ourselves and our traditions, then the steadying power is ours to exercise. Truth and law are great and will prevail . . . In the foreign fields of France and Flanders there are some spots that will be for ever Canada, for there our brethren sleep, and, as at Paardeburg, we may on their behalf inscribe this epitaph:—'Tell England, ye who pass this monument, that we, who died serving her, rest here content.' Or where specific landmarks are obliterated and no identification possible, 'Somewhere hereabouts lies a very gallant gentleman.' Of such are Mercer and Moss, and scores of others, whose names and service must be commemorated in worthy tablets at Osgoode Hall—our radiating centre—as they will be in the hearts of their countrymen."

The Chairman then referred to and gave the names of a number of the members of the Bar and Bench who had passed off the scene since the last meeting of the Association. He also spoke of the Library of Canadian Books given by Mr. Justice Riddell to Osgoode Hall. We have ourselves referred to this timely gift.

As to laws that will demand special consideration, growing out of the issues that overshadow the country, he spoke of the Naturalization Act, the Treason enactments, and the enforcement of the Militia Act or some other provision for Universal National Service for home defence, but as to "home defence" he properly says that its frontiers are wherever our boys are fighting for us. He spoke as a citizen of the Greater Britain and not as a "little Canadian."

Col. Ponton gave as an appendix to his report an interesting

remembrance of the members of the legal practitioners who signed an agreement, dated June 21, 1865, to close their offices during the summer vacation at 3 p.m. These names are as follows:—Blake, Kerr & Wells; Crooks, Kingsmill & Cattanach; Cameron & McMichael; Ross, Lauder & Patteson; Gwynne, Armour & Hoskin; Robinson & McBride; C. Gamble & G. D. Boulton; Carroll & Paterson; Jarvis & Edgar; Hodgins & Chadwick; Bacon & Taylor; Murphy & Kingstone; Beatty & Chadwick; Smith & Wood; Morris & Smith; Bull & Boyd; Mackenzie & Freeland; Whitley & Esten; Read & Boyd; Jones Bros; J. Sawrin McMurray; Barrett & Evans; Atkinson & Boswell; Vance & Canavan; Bell, Crouther & Tilt; John Hector; Patton, Osler & Moss; O'Connor & Blevins; P. McGregor; Galt & Henderson; D. Blain; Van Koughnet & Warmoll; Geo. Martin Rae; Cameron & Harman; Cameron, Harman & Murray; C. Robinson; Helliwell & O'Brien; Ed. Fitzgerald; S. J. Van Koughnet; J. H. Doyle; Brough & Snelling; James Maclennan; Donoven & Hayes; Duggan & Burns; Boomer & Stephens; Cameron & Scott; D. Mitchell McDonald; Boyd & Stayner; Crawford & Crombie; Macdonald & Howard; Geo. B. Nicol; John Crickmore; Morrison & Sampson; John Leys; A. MacNabb; S. H. Strong; Paterson, Harrison & Paterson; George Brooke; Robert Sullivan; Columbus H. Green; Cameron & Smart; Alex. Lieth.

An analysis of the above list shews that twelve of these practitioners were subsequently appointed to the Bench; ten to the Superior Court, and two as County Court Judges. Only fourteen of the above list are living at this date. The list comprises most of the practitioners in Toronto at that time, but not all; notably Paterson & Beatty, successors to the firm in which the well known names of Robert Baldwin and Adam Wilson appeared.

Flotsam and Jetsam.

THE "GIN" STORY—A TRUE STORY.

R., a hotel-keeper, was convicted of selling gin after hours and appealed to a District Court Judge of Ontario, of Irish extraction. Counsel for the accused was of the same extraction. The complainant, a provincial constable, testified that the offence had been committed and that he had personally tasted the gin. The following cross-examination ensued:—

Counsel: You are positive that the bottle contained gin?

Witness: Certainly.

C.: Then you are an expert on the subject of gin?

W.: Well! No, not exactly.

C.: But you know the bottle contained gin? *W.:* Positive.

C.: What kind? *W.:* Beg pardon!

C.: What kind, I said. *W.:* I don't understand you.

C.: Now, sir, if you know gin so well, how many kinds of gin are there? *W.:* I don't know, but I know that bottle held gin.

C.: Now, sir, remember you are on your oath. Do you know the difference between that brand of gin commonly called "Holland gin" and that other kind of gin called "Oxy gin?"

W.: (Hesitatingly)—No.

C.: I thought not! Then it might have been oxygen?

W.: It might.

C.: Of course—Now are you familiar with another kind of gin called "hydro gin?" *W.:* No, I am not.

C.: Then the contents of that bottle might have been "hydrogen" for all you knew?

W.: It might, but I am sure it was gin.

C.: Now, sir, there is still another kind of gin called "Nitro gin," do you know anything about it? *W.:* No, sir.

C.: So that although you swear that the bottle contained gin, you cannot tell whether it was oxygen, hydrogen, nitrogen or plain De Kuyper gin? *W.:* I cannot.

C.: I thought not, I thank you.

The Judge:—This Court has listened with very considerable interest to the cross-examination of the complainant which has perhaps ensnared him into a "gin" not referred to by counsel. It might appear from this examination that the complainant was remarkably ignorant of the distinction between the various kinds of gin particularly enumerated and described by the defendant's counsel. But this Court, while disclaiming any thought of being an expert on the subject of gin, is able to differentiate between that kind of gin which so often furnishes the slings of outrageous fortune, and these other various brands of gin referred to by counsel, nor is this Court unfamiliar, as might be conjectured, with that by-product of oxygen commonly called "hot air." Relying therefore upon the evidence before it, and its own limited knowledge, the Court dismisses the appeal and upholds the conviction. The Court however has no disposition to be unduly severe upon the accused, notwithstanding the cross-examination, and only imposes the ordinary costs.

Canada Law Journal.

VOL. LIII. TORONTO, MAY, 1917. No. 5

FORFEITURE UNDER CONTRACTS FOR SALE OF LANDS.

SOME OBSERVATIONS ON ARTICLE BY MR. SHIRLEY DENISON, K.C., ANTE P. 82.

The third question discussed by Mr. Denison's able and timely article is: "The purchaser, having paid some of the instalments of purchase money, makes default; can the vendor cancel the sale and keep the instalments?" From the Privy Council decision in the Saskatchewan case of *Drinkle* v. *Steedman* (1916), 1 A.C. 275, Mr. Denison comes to the conclusion that "relief against forfeiture of the purchase money will be granted even in cases where specific performance cannot be had."

The judgment itself lays down no broad general rule in the above terms; and as the circumstances of that case were somewhat unusual, the applicability of the judgment should, it is submitted, be limited to the special circumstances of that case.

These special circumstances were as follows: The vendor had given notice of forfeiture of both lands and moneys pursuant to a special clause in the contract, and then brought action for a declaration, that the forfeiture claimed to have been thus extra-judicially effected was effective and valid. Furthermore the defendant not only pleaded being ready, willing and able to pay and offered to bring the balance of the money into Court, but also claimed and insisted upon specific performance by the vendor. Finally the vendor by his pleadings rejected this offer and refused to accept the balance of the purchase moneys and resisted specific performance.

These three features distinguish the case from the one ordinarily arising, *i.e.*, where (*a*) the vendor comes into Court asking

not for rescission but for performance by the purchaser within a time to be set by the Court and, in default, cancellation of the contract and forfeiture of the moneys paid out, and (*b*) the purchaser does *not* express willingness and ability to pay and the vendor *does not* refuse to accept the money. This common everyday case is not dealt with at all by the *Drinkle* judgment, and on account of its commonness it deserves special attention and enquiry.

The case of *Re Dagenham Docks*, L.R. 8 Ch. 1022, is also cited in several cases as an authority for some such broad, general proposition as Mr. Denison has based upon the *Drinkle* case. But the circumstances there were similar to those in the *Drinkle* case in this essential respect that the purchaser was ready, willing and able to pay and complete his contract although the fixed time for payment was past. The judgment, in relieving the purchaser from the forfeiture provided by the contract, does so upon the express condition of the purchaser paying the balance of the purchase money with interest as compensation for his default. In *Barton* v. *Capewell*, 68 L.T.R. 857, cited by Mr. Denison in this connection, the vendor had rescinded or cancelled extra-judicially as in the *Drinkle* case, and the validity of such rescission was assumed by the Court.

I. Does the presence or absence in the contract of a clause providing for forfeiture upon notice effect such a case? How can it? Such a clause prescribes an extra-judicial procedure and surely can have no application whatever when forfeiture (if that indeed is an appropriate expression) is sought by another procedure, viz., by a suit not based on any such notice or clause but upon other considerations.

II. If not, then how can there be jurisdiction to relieve against forfeiture of purchase-moneys paid? Is not the jurisdiction to relieve against forfeiture limited to and founded upon penal *clauses* in contracts?: 13 Halsbury, 150-154.

III. It may be answered, however, that the Court can reach the same result or relief by exercising another and distinct jurisdiction, *i.e.*, the jurisdiction to impose equitable terms on a plaintiff seeking equity. This raises the question as to what is the

essential nature of the kind of suit now under consideration. Mr. Denison says: "It [the proposition that the vendor must return everything but the deposit] naturally follows also from the attempt to rescind the contract: the contract being put an end to both the parties must be remitted to their original positions."

It is true that such an action is commonly called a "rescission" suit but the name seems inappropriate. A true rescission suit would seem to be where the plaintiff alleges that no contract has in reality ever been entered into between the parties but a certain document purporting to be such contract was entered into through fraud or mistake and the Court is asked to set aside the document in the sense of declaring that it never was originally binding upon the parties. In such cases, restitution by the plaintiff would be a natural or logical term or condition to be imposed upon him by the Court in granting relief, and in fact *is* invariably a term. On the other hand, in the kind of suit now under consideration the vendor comes into Court declaring that the contract *was* really entered into and that it remained in full force and effect for some time and he asks for a declaration that by reason of the purchaser's repudiation, he, the vendor, is and always will be discharged, absolved, and relieved from performance of his part of the contract, so that the contract is at an end in so far at least as the land is concerned. The proper term to describe the result thus sought would seem to be the word "determination" rather than the word "rescission."

Halsbury (vol. 7, at p. 438), speaking of contracts in general, says: "Where a contract is to be performed on a future day or the performance is dependent on a contingency and one of the parties repudiates the contract and shews that he does not intend to perform it, the other party is absolved from further performance of his part of the contract and, if he elects to do this, the party in default is not entitled to an opportunity of changing his mind. In such a case the contract is completely determined and the party who is in default cannot insist upon the performance by the other party." Mr. McCaul's valuable work on Vendors and Purchasers, 2nd ed., ch. 5, applies this general principle of contracts to the sale of land:

IV. Even if the Court had jurisdiction to impose such a term (*i.e.*, the return of instalments paid) would it be equitable to do so? It is submitted that it would *not* be, for the following reasons:—

The purchaser has had the valuable right to sell the property to another person and also, in the ordinary case, has had possession. Thus (A) the purchaser has not suffered a total failure of consideration; (B) It is impossible for the Court to adequately arrive at the value of the advantage gained on the one side and lost on the other; (C) The parties cannot be restored to their original positions.

In *Butchart* v. *McLean*, 15 B.C.R., 246, Irving, J.A., says: "The contract being in part performed it is impossible to relegate the parties to the original position they were in before the contract was made. The plaintiff has parted with his good money but has not the defendant lost something? Did he not forego the right to sell in the interval, no matter what price was offered? How is it possible to assess the damages he has sustained?"

In *Mulholland* v. *Holcombe*, 6 U.C.C.P. 520, the Full Court in refusing to order a return of monies to a purchaser says: "We find it laid down in Chitty on Contracts (624 of the 3rd ed., p. 742), the action for money had and received is not maintainable if the contract has been in part performed and the plaintiff has derived some benefit and by recovering a verdict the parties cannot be placed in the exact situation in which they respectively stood when the contract was entered into. It cannot be said that the plaintiff did not derive some benefit from the contract as he went into possession of the lands and retained possession nearly one year."

Halsbury (vol. 7, p. 477), says: "The action for money had and received is not maintainable where the parties cannot be restored to their original positions: as where the plaintiff has had possession of the defendant's goods during a certain period and it is impossible to ascertain of what rights and privileges the defendant has been deprived;" and citing *Bede* v. *Blandeford*, 2 Y. & J., 278, and *Clarke* v. *Dickson*, E.B. & E. 148. Halsbury (vol. 7, p. 483), says: "Where a sum of money is paid for an entire considera-

tion and only a partial failure of the consideration ensues no proportionate part of the amount paid can be recovered as money had and received to the payer's use."

These principles it is submitted are equitable. And if the purchaser has no right of action for refund of instalments paid, how does he acquire the right thereto merely by reason of his being the defendant in the suit and the vendor the plaintiff?

V. Inability to pay surely cannot be held to give the purchaser an affirmative right to such a refund. In *Soper* v. *Arnold*, 14 A.C. 435, Lord Macnaghten, says: "If there is a case in which a deposit is rightly and and properly forfeited, it is when a man enters into a contract to buy real property without taking into consideration whether he can pay for it or not."

VI. If the defaulting purchaser were entitled to a refund in such a suit, the practical result would be to make it purely optional with him whether he will carry out his contract or not, while of course the vendor is firmly bound. This point is emphasized in the above mentioned chapter of Mr. McCaul's.

VII. A default by the purchaser after a decree for specific performance should, it is submitted, be regarded much more seriously than mere delay in payment before or apart from such a decree. Halsbury (vol. 25, p. 397, footnote (*n*)), says: "If after an order for specific performance the purchaser makes default in payment of the purchase money the vendor is entitled to an order for rescission (*Foligna* v. *Martin* (1853), 16 Beav. 586; *Watson* v. *Cox* (1873) L.R., 15 Eq. 219; *Hall* v. *Burnell* (1911), 2 Ch. 551." In *Standard* v. *Little*, the Saskatchewan Full Court says: "The failure of the purchaser to obey the decree (for specific performance) and pay the money found to be due is a sufficient abandonment or repudiation of the contract to justify rescission without restitution: *Henty* v. *Schroder* (1879), 12 Ch. D. 666."

VIII. It is submitted that it is inappropriate to apply the term penalty to the position of a purchaser who has been dealt with by the Court as in *Standard* v. *Little* above. Halsbury (vol. 13, p. 151), speaks of a penalty as "a larger sum to be paid on non-payment of a smaller sum." Neither is it a case of forfeiture. It is simply a case of part performance of fulfillment, of an in-

divisible consideration, full performance or fulfillment of which is a condition precedent to the party being entitled to anything. In *La Belle* v. *O'Connor*, 15 O.L.R. 519, Anglin, J., describes payment in full as a "condition precedent" and adds "against conditions precedent it is well settled that there is no equitable jurisdiction to relieve."

In *Kerfoot* v. *Yeo*, 20 M.R. 133, Macdonald, J., says: "Had he not abandoned the contract, and had he expressed himself as ready and willing to carry out the terms, and sought specific performance of it, he might be entitled to a return of the moneys paid by him."

In *Hole* v. *Wilson*, 10 W.L.R. 154, Prendergast, J., says: "Nor do I see that it matters (and this has reference to the defendant's claim for a return of the $2,000) whether the forfeiture clause is in the nature of a penalty. Supposing it were? The return of the $2,000 could only be decreed against the plaintiff as an alternative left to her between that and the performance of her part of the agreement. In order to have a standing before this Court the defendant must at least be in a position to say: "I am ready and willing to perform my part of this agreement, I ask the Court to compel the plaintiff to perform hers; and if she does not do so, I claim the return of the $2,000."

The terms "penalty" or "forfeiture" are no more appropriate in this connection in the case of a sale of land than in the case of the sale of chattels. Halsbury (vol. 25, p. 279), after speaking of the right of the buyer to recover money paid as on a failure of consideration says: "Secus where the buyer only is in default, see *Pitt* v. *Casenot*, 4 M. & G., and *Thomas* v. *Brown*, 1 Q.B.D. 714."

IX. The positions of vendor and purchaser under an agreement of sale are commonly and fairly considered as closely analogous for most purposes to the positions of mortgagee and mortgagor. The judgment for foreclosure in a mortgage action makes no provision for refund or return of the moneys, paid by the mortgagor; and such judgments of equity Courts though established for centuries do not appear to be criticized as unjust for lack of such a provision.

F. HEAP.

Winnipeg.

*SOME SUGGESTIONS REGARDING COMPANY LEGISLATION.**

The Dominion Parliament has power to and has enacted a statute under which the Secretary of State may issue charters of incorporation for all manner of commercial companies with authority to transact business throughout Canada, and it has been lately held that companies so incorporated may carry on their operations in all or any of the Provinces. Each of the nine Provinces has its statutes, under which it undertakes to incorporate companies with power to carry on their operations in the Province and elsewhere at their discretion.

The Provinces generally require companies incorporated by the Dominion or by another Province to obtain licenses and to file elaborate statements of their affairs with officers, designated by the respective Acts.

Some of the Provinces deny the right of extra-Provincial corporations and Dominion corporations to do business or to enforce contracts within the Province unless and until they had paid the fee , registered, and complied with the other conditions laid down by the Provincial legislation. We need not consider whether the Provinces have any jurisdiction over Dominion or extra-Provincial corporations or whether the can insist as a prerequisite to doing business within the limits of the Province on such companies complying with their requirements. It is enough to know that they insist they have these powers and that companies disputing their validity must ascertain their own rights by tedious processes of litigation ending in the Privy Council.

Lawyers can readily understand how desirable it is that all company law or indeed all law should in so far as possible be the same throughout the Dominion of Canada so that a man of business, educated in the law of one Province, may not be in a foreign land when he crosses its borders into another or that companies, like individuals, may not be thwarted or embarrassed in business

* This is a paper by Hon. George Lynch Staunton, K.C., Senator, read at the Annual Meeting of the Ottawa Bar Association.

by unnecessary and irritating acts of the various legislatures. The chief reason why, I think, the Provincial Governments are so industriously building up barriers against Dominion and extra-Provincial corporations is because they need the money paid for charters by those who wish to take advantage of the Companies' Act. These fees are in the aggregate large and are of much more importance to the Province than they are to the Dominion, and if one can overcome this objection it seems to me that the Provinces would readily acquiesce in the passing of the Dominion Companies' Act and repeal their Acts if they found that no Provincial interest would be affected.

I propose therefore that the Dominion Government should amend the Companies' Act, as follows:—

1. Enact that the Provincial Secretary or some other member of the Provincial Government should have authority to issue charters for the Secretary of State at the capital of the Province.

2. That all applications for charters should be made to the Provincial Secretary of the Province in which the head office of the proposed company was intended to be situated.

3. That the schedule of fees named in the Act should be paid to the Provincial Secretary, and that he should account for twenty per cent. to the Secretary of State and apply the remainder for the use of the Province.

4. That the Provincial Secretary should forward a copy of the application and the charter to the Secretary of State immediately after t e granting of the charter.

5. That all returns required to be made by the Act should be made to the Provincial Secretary in the Province in which the head office is situated, and that the Provincial Secretary should forward copies of these returns to the Secretary of State immediately after their receipt.

6. That all companies theretofore incorporated under any Provincial Companies' Act would *ipso facto* on filing an application in a simple form to be made a schedule to the Act, and on paying a nominal fee become incorporated to the same extent and with the same powers, privileges and rights as they had under their Provincial charters, under this Act, and providing that

their incorporation under the Provincial charter should continue to exist.

The Provinces then should repeal all legislation requiring companies to make returns or to take out licenses together with all other legislation inconsistent with or rendered unnecessary by the Dominion Companies' Act and declare the Dominion Act to be the law of the Province regarding companies.

If some such course as above indicated were taken we would in the end have uniform company legislation throughout the Dominion which, as the years go on and the population and the business of the country increases, will be found to be most desirable.

Common and Mining Stock.

Whether or not the above recommendations are ever acted upon, all the company law of the Dominion of Canada should be amended so as to provide that only one class of stock should be issued by any company. The enormous capitalization of common or of what is called "watered" stock of Canadian corporations is most lamentable. No sound, commercial or financial reason can be urged for the issue of more than one class of stock and both the interests of the public and of the companies themselves would be better served if only one kind of stock was allowed to be issued. To illustrate: Persons having a commercial undertaking whose assets as a going concern are reasonably worth $5,000,000 wish to become incorporated. The usual course in Canada is under a trust deed to issue as large amount at 5 or 6 per cent mortgage bonds as can be disposed of in the market, assume in this case, $2,500,000—then to issue $2,500,000 of cumulative preferred stock. Then the directors value the goodwill at another $5,000,000 and issue $5,000,000 of common stock which everybody knows is "blue sky." The company commences business with $2,500,000 bonds and $5,000,000 common stock and $2,500,000 preferred stock. The common stock is usually given as a bonus to purchasers of bonds or preferred, or sold to the speculative public in boom times at from 30 to 70 cents on the dollar of its face value and in dull times at from 10 to 20 cents on the dollar. The holders of these shares have sometimes the control of the

election of directors, in many others having half the voting power, in many others with a small amount of preferred they can control the company. They soon become hungry for dividends and commence a campaign on the directorate for their payment, with the result that all the profits or a greater portion of the profits which should go to the reserve for the payment of dividends on stock which was issued for value is paid out to people who never gave the company any value for the stock and when dull times come along the company is compelled to pass its dividend on its preferred stock because it has been unable to build up a proper reserve against lean years, and when it wishes to make additions to its business it is compelled for the same reason to make a further issue of bonds. In a great many cases besides these evil results the common stock prevents the company from accumulating a proper working capital so that it is always at the mercy of the bank. Prudent investors will hesitate and wise solicitors will refuse to advise their clients to purchase the preferred stock of companies, no matter how flourishing, which have a large quantity of outstanding water securities. The only persons who desire or who derive any benefit from watered stock are the speculating public and the brokers. It is not the law's business to encourage stock speculation. Its duty ceases when it provides the machinery for creating companies and affording to them power and means of carrying on the business on sound financial principles for which they are incorporated. No stock should be issued excepting for an equivalent in cash or in property as it is expressed in some of the English cases "an equivalent in meal or in malt."

Common stock is used by promoters as a lure to induce the public to purchase preferred shares. If an equal amount of common is given to every buyer of the same amount of preferred clearly no benefit accrues to any; if an unequal proportion is given to various purchasers of the same amount of preferred then an injustice is done to those who receive the lesser amount; and if a large amount of common is given to promoters and underwriters for services or risk as is the common case an injustice is done to the purchasers of the preferred who came in because of the bonus of common. If no bonus of common is given, true no injustice is

done the preferred holders who know that the common goes to the promoters and underwriters, but the value of the preferred is affected by reason of the inability of the company to build up a reserve and the company may be crippled for want of capital which goes to pay dividends on the common for which little, if any, value is given. The issue of common stock is contrary to the intention of the limited company legislation which was that all issued stock should represent an equal amount of capital paid into the coffers of the company. and it is only by taking advantage of the decisions which hold that where there is any consideration given for the issued stock the Courts will not inquire into its adequacy that watered stocks other than mining shares are legally issued.

Another reason why issue of common stock without adequate consideration should be forbidden is because it affords an excellent opportunity to defraud the people, the great majority of whom, including the legal profession, are quite ignorant of company law and promoters' practices and believe that things are what they seem. They do not know or understand that when they buy a hundred shares of the par value of $10,000 that the real value of such shares is usually nothing. There are hundreds of millions of dollars of mining and common stocks roaming about Canada seeking a resting place in the pockets of the innocent stock gamblers which are worth perhaps the paper they are printed on and have no other intrinsic value. Even if it is true that it is impossible to prevent shares being issued for less than a full equivalent of their face value because of the difficulty of appraising at its true value property taken in exchange it only makes it more desirable that only one class of stock should be permitted, because where all the shares rank equally for all purposes those who understand among persons who pay the money or give the property would see that they were not swept away in a flood of stock given to persons who give nothing but services for their allotments.

Mr. Thomas Mulvey, K.C., Under Secretary for State, in his interesting article, "Certified Securities," *American Economic Review*, September, 1914, thinks two kinds of stocks not un-

desirable and that the legislature cannot protect the public against its own stupidity. My reply is that true the legislature cannot be expected to shepherd the lambs through life, but still the legislature should not set traps for them.

The most glaring cases of encouraging gambling and unwise and improper speculation by the Legislature are those Acts of the various Provinces for the incorporation of mining companies. There is no reason why dollar stocks selling at two cents on the dollar should be issued excepting that they are tempting betting propositions. To incorporate a company for mining purposes and allow it to issue stocks with no personal responsibility at any price it chooses to the public is no more and no less than a great lottery scheme authorized and fathered by the State. In countries where people profess an abhorrence for the most innocent kind of gambling, it is very curious to see their tolerance for perhaps the most pernicious form of gambling, that is, stock speculation. A perusal of the mining promoter's literature which is fabricated to extract the dollars from the simple minded should satisfy anybody that it were much better to allow unrestricted betting on horse races, when one at least gets a run for his money, than continue the legislation under which these companies carry on their business. It is said that if we did not allow their incorporation, incorporation for any scheme which man can devise is authorized in one or other of the neighbouring States, and that the Provincial Government would lose the fees while there would be no diminution of these companies. Appropriate legislation might easily be passed forbidding under very severe penalties sales of the stock of any foreign company within this Province which issued its stock for less than its par value and providing that no company which did not comply with the laws of the Province should operate within its limits. It is said that unless money can be raised by these methods there would be no mining development. I emphatically dispute this statement. People will pay, if they wish to do anything more than speculate, a dollar a share for 100 shares as quickly as ten cents a share for 1,000 shares. Further, in most cases the shares are sold for a nominal sum which is used to mine the public, not to develop the mining country.

Equitable Relief.

The case of *Foss* v. *Harbottle*, 2 Hare, 461, is the foundation of what, to my mind, is an unwise rule of law, namely, that the Courts will not interfere with the domestic affairs of a company excepting to prevent or to give relief against fraud, where the acts complained of are confirmed by or are capable of being confirmed by a majority of the members of the company. It ought to be a law that neither the directors nor a majority should be entitled to do anything which is inequitable with regard to the minority and the Courts should have power to give relief against inequitable conduct. Corporations only exist for the convenience of business and not in order to allow a majority to tyrannize over a minority. Where two or more persons are in partnership no partner has in the eye of the law any more control or right over the undertaking in which they are embarked in common than the other, and there is to my mind no sound reason why the law of partnership in that respect should not apply to companies. It is not here suggested that the Court should interfere, excepting in cases of injustice. Where the majority, in the exercise of its judgment, adopts a course which reasonable people might well consider for the interest of the company, the Court certainly should have no right to interfere, but where the only justification for the action which injuriously affects the interests of the minority is that it is the act of the majority or the act of the directors who control the majority, then it is a denial of justice to deny that relief on the doctrine laid down in *Foss* v. *Harbottle*.

Director Officials.

The provisions in the Companies' Act, with regard to the payment of directors who are officers of the company, which requires that no remuneration shall be paid to them unless under a by-law passed by the shareholders is nearly universally evaded.

A general by-law on the incorporation of a company is passed authorizing the directors to pay to a director officer such amount as they in their discretion may think proper and the matter never comes before the shareholders again. In large corporations

this evasion of the Act seldom if ever occasions injustice, but in small companies it constantly does, as men who control such companies usually are the directors and can increase and do increase their own salaries, keeping equal step with the prosperity and operations of the company, so that many investors in these semi-private companies are starved out.

CLASSES MOST PROMINENT ON THE FIRING LINE.

As illustrating public opinion in Britain as to the righteousness of the cause for which the allied armies are fighting, it is both interesting and instructive to note that no element in the population has contributed more largely, in proportion to its numbers, than the professional class; the clergymen, who have emptied their homes of their young men, the lawyers and doctors of medicine, men of intelligence and thinking power above the average, able to judge of the right or wrong of a large national cause. Lists of names have been carefully collected in these three professions in England and Scotland, and, while it is not said that they are complete, yet the extent to which they prove that these professions have furnished of their very best is a remarkable testimony of the devotion to a good cause of the guiding thought of the nation.

In a considerable degree the same is true of the aristocracy and gentry, and also of the working class of Britain. To the latter their country is everything, for indeed they possess but little else to satisfy their manly pride; and the aristocracy, being so deeply rooted in the past of the United Kingdom, naturally associate with their families the glorious traditions their ancestors had done so much to create.

The great middle class may not have done comparatively as well, for reasons which do not apply to the other two, yet the middle class also has shewn itself to be not devoid of patriotism in a real sense when the very existence of the country is at stake.

REVIEW OF CURRENT ENGLISH CASES.

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SOLICITOR—LIEN—DOCUMENTS OBTAINED WITHOUT LITIGATION—BANKRUPTCY—TRUSTEE—DOCUMENTS OBTAINED BY SOLICITOR AFTER BANKRUPTCY—COSTS.

Meguerditchian v. *Lightbound* (1917) 1 K.B. 297. This was an action by a trustee of a bankrupt to recover certain documents belonging to the bankrupt on which the defendants (a firm of solicitors) claimed a lien, as well for costs due them by the bankrupt, as also for costs due them by the trustee in respect of business transacted by them in procuring the delivery up of the documents in question. The plaintiff did not contest the defendant's right to a lien for costs for business transacted in reference to the documents pursuant to his instructions, and paid into Court the amount of such costs; but he disputed the right of the solicitors to any lien on the documents for any costs incurred in reference thereto, prior to the bankruptcy. Rowlatt, J., who tried the action, held that no lien attached to the documents in respect of any costs incurred in reference to any endeavours to procure them prior to the bankruptcy, and gave judgment for the plaintiff.

CONTRACT—ILLEGALITY—PUBLIC POLICY—ASSIGNMENT OF PRESENT AND FUTURE EARNINGS—COVENANT IN RESTRAINT OF PERSONAL FREEDOM—COVENANT NOT TO LEAVE PRESENT EMPLOYMENT WITHOUT SANCTION OF ASSIGNEE.

Horwood v. *Millar's Timber Co.* (1917) 1 K.B. 305. This was the case in which a Divisional Court decided (1916) 2 K.B. 44, (noted ante vol. 52, p. 350), that a man cannot, by contract, deprive himself of freedom of action so as to put himself in a position of slavery to another. The contract in question was one made between a lender and a borrower whereby the latter assigned his future earnings to the lender and bound himself not to leave his employment without the assignee's leave. The Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.), agreed with the Divisional Court that such a contract is against public policy and illegal. It is well to know that the law will not enforce contracts of that kind for they are absolutely inimical to freedom, for as Scrutton, L.J., puts it, such a contract "made the unfortunate man the slave of the money-lender."

CONTRACT—SALE OF GOODS—CUSTOM OF TRADE—REASONABLENESS—APPROPRIATION OF GOODS TO CONTRACT.

Produce Brokers v. *Olympia Oil & Cake Co.* (1917) 1 K.B. 320. This is an appeal from the decision of a Divisional Court (1916) 2 K.B. 296 (noted ante vol. 52, p. 390). The question was as to validity of a custom of trade to the effect that goods in transit might be validly appropriated by the seller to a particular contract, notwithstanding that at the time of such appropriation the goods might, unknown to the seller, have been actually lost at sea. The Divisional Court upheld the custom, and the Court of Appeal (Lord Cozens-Hardy, and Warrington, and Scrutton, L.JJ.), affirm his decision.

LANDLORD AND TENANT—COVENANT BY TENANT TO PAINT PREMISES IN SPECIFIED YEARS—NOTICE BY LESSEE TO TERMINATE TENANCY DURING CURRENCY OF YEAR—LIABILITY OF LESSEE.

Kirklinton v. *Wood* (1917) 1 K.B. 332. This was an action by a landlord against his tenants for breach of a covenant to paint the demised premises in a certain specified year. The tenants sought to escape liability on the ground that prior to the specified year they had given notice of their intention to terminate the tenancy during that year. The specified year was 1916, and according to the notice the tenancy was terminated in March, 1916. Lush, J., held that this was no defence.

SALE OF GOODS—APPROPRIATION TO CONTRACT—PASSING OF PROPERTY.

Healy v. *Howlett* (1917) 1 K.B. 337. This was an action to enforce a contract for the sale of fish in the following circumstances: The plaintiff carried on business as a fish exporter at Valentia, Ireland, the defendants contracted to buy 20 boxes of hard, bright mackerel to be sent to the defendants at Billingsgate. On the same day the plaintiff consigned by railway to his own order in Holyhead, 190 boxes of mackerel, and telegraphed instructions to the railway company, out of the 190 to deliver 20 of them to the defendants, and the rest of the 190 boxes to other named persons. Owing to a delay in the train from Valentia to Dublin the boat by which they ought to have been carried to Holyhead was missed. After the 190 boxes had been delivered to the railway the plaintiff sent the defendants an invoice in which they stated that the goods were at the buyers' risk after their delivery in Valentia to the railway company. The railway

company picked out twenty boxes and forwarded them to the defendants, but owing to the delay in transit the goods were not in a merchantable condition when they reached the defendants, and they refused to receive them. This was an action for the price. The plaintiff relied on the delivery to the railway company as being a delivery to the defendants, and contended that the property in the goods then passed to them, and therefore that they were henceforth at their risk. The County Court Judge, who tried the action, gave judgment for the plaintiff, but the Divisional Court (Ridley, and Avory, JJ.), held that the statement in the invoice could not be regarded as a term of the contract, because it was not sent until after the contract was complete; and that there had been no real appropriation of goods until after the goods arrived at Holyhead, and after the delay had occurred, which had caused the deterioration of the fish, and the defendants were entitled to reject the fish, and the plaintiff could not recover the price.

CRIMINAL LAW — EVIDENCE — INDECENT ASSAULT — COMPLAINT MADE BY PROSECUTRIX — ADMISSIBILITY — EVIDENCE.

King v. *Norcott* (1917) 1 K.B. 347. This was a prosecution for indecent assault, and the question was whether a statement made by the prosecutrix on the following day to a female friend was admissible evidence. It appeared that the statement was voluntarily made, and partly in answer to questions put by the woman, not of a suggestive or leading character, but which might have had the effect of persuading the girl to tell her unassisted and unvarnished story. The Court of Criminal Appeal (Lord Reading, C.J., and Darling, and Atkin, JJ.), held that it was admissible, and in so doing explain *Rex* v. *Osborne* (1905), 1 K.B. 551, on which counsel for the prisoner relied.

INSURANCE—LOSS OR DAMAGE TO GOODS—EXCEPTION OF THEFT OR DISHONESTY OF INSURED'S OWN SERVANT—BURDEN OF PROOF—EVIDENCE.

Hurst v. *Evans* (1917) 1 K.B. 352. This was an action on a policy of insurance to recover for loss of and damage to goods occasioned by thieves. The policy was subject to an exception of losses occasioned by theft or dishonesty of servants in the exclusive employment of the insured. The plaintiff was a jeweller, and the loss in respect to which the action was brought, was due

to a safe in his premises having been blown open and the contents taken by thieves. The defendant set up that the loss in question was occasioned by the dishonesty of one of the plaintiff's own servants. The only evidence of the alleged dishonesty was that the servant in question had been seen in a public house two days before the robbery in close conversation with three highly skilled safe breakers well known to the police. The plaintiff was unable to offer any evidence to shew by whom the theft was committed: and Lush, J., held that it was incumbent on him to shew that the theft was committed by some person other than a servant in his exclusive employment, and, as he had failed to do this, he could not recover. And even assuming that the burden of proving theft by the plaintiff's servant lay on the defendant, the evidence that had been offered was admissible for the purpose, though it might not be sufficient evidence to convict in a criminal prosecution; but evidence of the servant's bad character was not admissible.

CRIMINAL LAW — BIGAMY — FOREIGN MARRIAGE — EXPERT EVIDENCE—POLYGAMY.

The King v. *Naguib* (1917) 1 K.B. 359. This was a prosecution for bigamy. The accused was an Egyptian, and was accused of marrying a woman in England while his wife, whom he had married in England, was still alive. The accused sought to shew that the first marriage in England was void, because he had been previously married in Egypt to a woman who was still alive, and whom he had divorced, after the first, and before the second marriage in England. The accused was a Mahommedan and claimed that as he had divorced his Egyptian wife he was free to marry again. On appeal by the accused it was held by the Court of Criminal Appeal (Lord Reading, C.J., and Bray, and Atkin, JJ.), that the evidence of an expert was necessary to establish the validity of the Egyptian marriage, and that the accused was not competent to establish that marriage by tendering his own evidence of the performance of a ceremony, and leaving the Court to presume the effect thereof. The question is raised, but not decided, whether an English Court will regard as a marriage, one that is effected in a foreign country according to a law which permits polygamy.

BANKER—CHEQUE—RAISING AMOUNT OF CHEQUE—LIABILITY OF BANK—NEGLIGENCE OF CUSTOMER—FORGERY.

Macmillan v. *London Joint Stock Bank* (1917) 1 K.B. 363. This was an action by a customer of a bank to recover a sum paid

by the bank on a forged cheque of the customer. The forgery consisted in raising the cheque after being signed from £2 to £120. The forgery took place in the following circumstances: a clerk of the plaintiff's brought a cheque to be signed by one of the plaintiff's firm. The cheque had, as the Judge found, at that time a blank space for writing in the amount, but had on it in figures £2:0:0. The clerk after signature filled in the blank space with the words "one hundred and twenty pounds" and added before the "2" a "1" and after it an "0." The bank contended that the plaintiffs had negligently signed the cheque in such a shape as to give the clerk the opportunity of committing the forgery, and therefore they could not recover; but Sankey, J., who tried the action, held that the bank was liable, and in arriving at that conclusion refused to follow *Young* v. *Grote* (1827), 4 Bing. N.S. 3, which he considered had been in effect overruled by later cases. The law it must be confessed as decided in this case seems somewhat hard on banks. See *Columbia Gramophone Co.* v. *Union Bank of Canada*, 38 O.L.R. 326, a somewhat similar case.

SHIP—TIME CHARTER—RESTRAINT OF PRINCES—REQUISITION OF SHIP BY ADMIRALTY.

Modern Transport Co. v. *Duneric S.S. Co.* (1917) 1 K.B. 370. This was an appeal from the decision of Sankey, J. (1906) 1 K.B. 726 (noted ante vol. 52, p. 222). The question discussed on the appeal was simply whether the charterers of a ship chartered for a specified time, subject to an exception against restraint of princes, and which during the specified time is requisitioned and used by the Admiralty, are liable for the hire of the ship during the period it was so used by the Admiralty. Sankey, J., had held that they were liable, and his decision is now affirmed by the Court of Appeal (Eady, and Bankes, L.JJ., and Lawrence, J.). The contest arose, it may be observed, by reason of the hire received from the Admiralty being less than that payable under the charter party.

MAINTENANCE OF ACTION—MAINTAINED ACTION SUCCESSFUL—LIABILITY OF MAINTAINER—MEASURE OF DAMAGES—LIMITED COMPANY.

Neville v. *London Express Newspapers* (1917) 1 K.B. 402. This was an action to recover damages against the defendants for having wrongfully maintained an action of third party against the plaintiff, the defendants having no interest in the action

maintained. The defendants sought to escape liability on the ground that they were a limited company and therefore incapable of a criminal act, and also on the ground that the maintained action was successful and therefore the plaintiff suffered no damage. The facts were somewhat unusual. It appeared that the plaintiff had advertised a competition for a name for a new seaside resort, the establishment of which he was promoting, the winner of the competition was to get £100, and several lots of land were offered as consolation prizes, subject to the payment of £3 3s. 0d. for each conveyance. The defendants in a newspaper published by them denounced the scheme as a fraud, and offered to assist the winners of consolation prizes to bring an action to recover their money. Many of them accepted the defendants' offer and an action was brought in their names by the defendants' solicitor and was successful, and judgment was recovered for the repayment to the plaintiffs in that action of the various sums respectively paid by them to the plaintiff in the present action. The action was tried before Lord Reading, C.J., and a jury, and the jury found that the defendants did not act from any desire to assist persons to prosecute claims who would not otherwise be able to enforce their rights, and also that they did not act in the *bonâ fide* belief that the persons whom they induced to sue had any well-founded claim against Neville. On these findings the Chief Justice gave judgment for the plaintiff and held that the measure of damages was the plaintiff's costs of defence, and the costs he had been ordered to pay the plaintiffs in the maintained action, and he held that the company was liable civilly for the acts of its servants.

SOLDIER'S WILL—REVOCATION BY MARRIAGE.

In re Wardrop (1917) P. 54. Shearman, J., decided that a soldier's will is revoked by the subsequent marriage of the testator, whether the will be executed according to the usual form, or according to the form sufficient where the testator is on active service.

VENDOR AND PURCHASER—CONTRACT—MEANING OF "ET CETERA" IN CONTRACT—EASEMENT—RIGHT OF WAY—FORM OF CONVEYANCE—EXCLUSION OF OPERATION OF CONVEYANCING ACT, 18 (44-45 VICT., c. 41), s. 6—(R.S.O. c. 109, s. 15 (1)).

Re Walmsley and Shaw (1917) 1 Ch. 93. This was an application under the Vendors and Purchasers' Act to determine the proper form of the conveyance. By the contract in question

two plots of land and buildings, "material, etc"., were agreed to be sold; the contract omitted any mention of any right of way thereto. The premises were described by reference to a plan, and formed part of a larger property belonging to the vendor, and bounded on the north by a public highway. A farm cart track led from this highway across a field of the vendor, past the larger of the two plots sold, to the smaller plot. This cart track had been used by the former tenants of the smaller plot to carry coals and furniture, etc., thereto, but always with the permission of the vendor or her predecessors. A public foot path ran close to the side of the cart track up to the smaller plot. The purchaser claimed to have inserted on the conveyance an express grant of a right of way along the cart track, and the vendor insisted that he had no such right, and that the operation of the Conveyancing Act, 1881, s. 6 (see R.S.O., c. 109, s., 15 (1)). should be expressly excluded by the conveyance. Eve, J., who heard the motion, held that the words "et cetera" in the contract referred to "material" and were limited to something of that character, and did not carry the alleged right of way; but even if they included property of the same nature as land and buildings, the most they could include would be the rights appurtenant to the land and buildings. He also held that the contract was one for the sale of the premises with such rights as were legally appendant or appurtenant thereto, and the right of way claimed, not being appendant or appurtenant, nor a way of necessity, did not pass. He therefore held that the purchaser was not entitled to any express grant of the right of way, and that the conveyance should be framed so as to exclude the operation of the above mentioned section of the Conveyancing Act, 1881. This seems to be a case of which conveyancers would do well to make a note; as by omitting to exclude the operation of the Act, doubts may arise whether rights pass which were not intended to be conveyed.

COMPANY—TRANSFER OF SHARES—DIRECTORS—LIMITS OF DIRECTORS' DISCRETION TO REFUSE TO REGISTER TRANSFER.

In re Bede Steam Shipping Co. (1917) 1 Ch. 123. Where the directors of a company have power to refuse to register transfers of shares "if in their opinion it is contrary to the interests of the company that the proposed transferee should be a member thereof," such a power does not give them an unlimited power to refuse to register transfers, but only on grounds personal to the proposed transferee. Therefore it was held by the Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, L.J.—Scrutton, L.J., dissenting), that directors could not properly

refuse to register transfers of single shares, or shares in small numbers, because they do not think it desirable to increase the number of shareholders, or because they think that the transfer is not *bonâ fide* and that the transferee is to hold the shares as a mere nominee of the transferor, and to increase the number of shareholders who will support him in a policy which the directors disapprove. The order of Eve, J., directing the register of the transfers in question was affirmed.

MERGER — INTENTION — INTEREST — DUTY—SUBSEQUENT DEALINGS WITH PROPERTY AS AFFECTING QUESTION OF MERGER —EVIDENCE.

In re Fletcher, Reading v. *Fletcher* (1917) 1 Ch. 147. In this case the question was whether or not there had been a merger of a leasehold in the freehold. The facts were that two properties A. and B. were included in one lease at a ground rent, and were subsequently separately assigned by the lessees. The reversioners in fee took an assignment of property A. for the residue of the term. There was no evidence that they had any intention against a merger. About nine months afterwards, however, the reversioners mortgaged the term in property A. and the entire reversion separately, and the question arose whether or not the lease in property A. was still subsisting, or had been merged in the freehold. Astbury, J., held that there had been a merger and the subsequently treating the lease as if it had not merged, could not alter the fact, it not appearing that there was any interest, or duty, on the part of the grantees, to keep the term alive.

LIFE ASSURANCE COMPANY—DEPOSIT—COMPANY CARRYING ON OTHER CLASSES OF BUSINESS—WINDING-UP—COSTS—DEPOSITS AS SECURITY FOR COSTS IN ACTION BY LIQUIDATOR—(DOM. STAT. 1910, c. 32, s. 14).

In re National Standard Life Assurance Corporation (1917) 1 Ch. 193. The simple question involved in this case is as to the application in winding-up proceedings of the deposit required to be made by life insurance companies under the English Assurance Companies Acts (see Dom. Stat. 1910, c. 32, s. 14), for the protection of the holders of life policies, and Eve, J., held that the same is available for the general costs of the winding-up, and for the repayment of deposits made by the liquidator as security for costs in proceedings which he has been authorized by the Court to carry on, so far as the same costs and deposits relate to the business of life assurance for which the deposit was made.

COMPANY — WINDING-UP — INSOLVENT COMPANY — LIQUIDATOR —OBJECTION OF CREDITORS TO APPOINTMENT OF RECEIVER FOR DEBENTURE HOLDERS AS LIQUIDATOR.

In re Karamelli & Barnett (1917) 1 Ch. 203. The question involved in this case was as to the appointment of a liquidator to an insolvent company. One of the proposed liquidators was also the receiver for the debenture holders of the company, the creditors of the company objected to his appointment, and Neville, J., gave effect to their objection, on the ground that the interests of the debenture holders might be antagonistic to those of the creditors.

WILL—TESTAMENTARY GIFT OF COLLECTION OF COINS—REVOCATION — ERRONEOUS ASSUMPTION OF FACT — REVOCATION WHETHER CONDITIONAL OR ABSOLUTE—EVIDENCE—STATEMENTS BY TESTATOR.

In re Churchill, Taylor v. *University of Manchester* (1917) 1 Ch. 206. The question in this case was as to the effect of a revocation of a testamentary gift in the following circumstances: In 1901 the testator by his will gave all his coins with the cabinets in which they were placed, to the defendants. In January, 1912, he wrote a letter to the defendants whereby he purported to present to the defendants his "collection of coins" on certain conditions and the defendants accepted the gift on the conditions specified, but no coins or cabinets were then handed over. In February, 1912, the testator made a codicil in which after reciting the gift of coins and cabinets in his will, revoked the gift, and declared that he had, during his lifetime, handed over to the defendants all the coins and cabinets he intended to leave them by his will. In August, 1912, the testator delivered to the defendants eleven cabinets containing the greater part of his collection, but some remained in his possession. The testator died in 1915 and the defendants claimed the remainder of the coins and cabinets as part of his gift to them, contending that the revocation by the codicil was based on an erroneous assumption of fact, and therefore was conditional and inoperative, so that the original gift by the will took effect. Neville, J., however, held that the revocation by the codicil was absolute, and that the defendants were only entitled to the coins and cabinets handed over to them. He also held that statements made by the testator at the time when the coins and cabinets were handed over were not admissible in evidence.

COMPANY — REORGANIZATION OF CAPITAL — REDUCTION OF CAPITAL—SUBDIVISION OF SHARES PARTLY PAID UP—PART OF RESULTING SHARES PARTLY PAID, AND PART WHOLLY UNPAID —SURRENDER OF WHOLLY UNPAID SHARES—COMPANIES ACT, 1908 (8 EDW. VII. c. 69), ss. 41 (*d*), 45, 46 (*a*), 120—(R.S.O. c. 178, s. 16).

In re Doloswella Rubber & Tea Estates (1917) 1 Ch. 213. Under the English Companies Act, 1908, applications for reduction or reorganization of the capital of limited companies have to be made to the Court which under the Ontario Companies Act (R.S.O. c. 178) are made to the Lieutenant-Governor. This case furnishes an illustration of the kind of reorganization of capital which is sanctioned under the English Act, and incidentally furnishes a guide to what may be done under the Ontario Act. The issued capital of the applicant company in this case consisted of 640 shares of £500 each, on each of which shares £185 had been paid. The company sought to divide each £500 share into 5 shares of £100 each, to apply the £185 paid, equally on three of the new £100 shares, and to treat the other two shares as wholly unpaid; these shares it was proposed should be surrendered for re-issue. The Court made an order confirming the division of the shares, and the proposed application of the amount paid up, and declared the 1,580 wholly unpaid to be "unissued, and nothing is to be deemed paid thereon." The question of the right or power of a company to take a surrender of its own shares, which have been fully paid up, cannot be said to be clear. It is thought by some that it is not possible because it might lead to the distribution of the capital represented by such surrendered shares among the other shareholders and thereby cause a reduction of capital, which it is thought might be prejudicial to the rights of third persons dealing with the company, as reducing their security. On the other hand, the transaction is one that would be for the obvious benefit of both the company itself and the other shareholders, and would probably be sanctioned subject to the condition that the capital surrendered would not be distributed except on the final winding-up of the company.

SOLICITOR—BILL OF COSTS—SOLICITOR TRUSTEE—TAXATION BY CO-TRUSTEE—"PARTY CHARGEABLE"—SOLICITORS ACT, 1843 (6-7 VICT. c. 73), s. 37—(SOLICITORS ACT, ONT. R.S.O. c. 159, s. 40).

Re Davies (1917) 1 Ch. 216. This was an application for the taxation of a solicitor's bill. The solicitor was a trustee entitled to

charge costs for services rendered for the trust estate. The applicant was his co-trustee, and it was held by Neville, J., that the applicant was "a party chargeable" within the meaning of s. 37 of the Solicitors Act (see R.S.O. c. 159, s. 40), and as such entitled to have the bill taxed.

ADMINISTRATION — SUPPOSED INTESTATE — CANCELLED WILL — RECEIVER PENDING PROBATE—PRACTICE.

In re Oakes, Oakes v. *Porcheron* (1917) 1 Ch. 230. This was an application for the appointment of a receiver of a deceased person's estate. The deceased was supposed to have died intestate, but a will, which appeared to be cancelled, was found amongst his papers. The defendant claimed that this will had not been effectively cancelled, and was operative. After the institution of this action and service of the notice of motion for a receiver, the defendant instituted proceedings in the Probate Division for probate, and now resisted the motion for a receiver on the ground that an administrator *ad litem* might be appointed in the probate action; but Neville, J., held that the present action having been first properly instituted, the jurisdiction of the Court could not be ousted by applying for relief to another Division, and he granted the motion.

MARRIAGE SETTLEMENT—AGREEMENT BY HUSBAND TO SETTLE AFTER ACQUIRED PROPERTY—BREACH OF AGREEMENT BY HUSBAND—COVENANT TO SETTLE WIFE'S AFTER-ACQUIRED PROPERTY—TRUSTEES NOT BOUND TO ENFORCE COVENANT FOR BENEFIT OF VOLUNTEERS.

In re Pryce, Nevill v. *Pryce* (1917) 1 Ch. 234. This was an application by the trustees of a marriage settlement for advice as to whether or not they were bound to take proceedings to enforce (1) an agreement by the husband to settle after-acquired property, and (2) a covenant to settle the wife's after-acquired property. The husband had, in his lifetime, received a considerable sum which was bound by his agreement, but had spent it, and died intestate and leaving no estate beyond what was required to pay his funeral expenses and debts. The husband was also entitled to a reversionary interest in a sum of £4,700 which had fallen into possession since his death, and which was still outstanding in the hands of the trustees of the will of the husband's father. The wife was also, under a gift from her husband, entitled to a reversionary interest in a certain fund which, as the Judge found, was caught

by the wife's covenant. Subject to his widow's interest for her life in the £4,700, it was held in trust for the husband absolutely—and the ultimate residue of the wife's fund was held in trust for her statutory next of kin—there being no issue of the marriage; the question therefore resolved itself into the simple point whether the trustees of the marriage settlement ought to take proceedings to enforce the covenant and agreement to settle the after-acquired property for the benefit of the next of kin of the husband and wife respectively, and Eve, J., held that they ought not, because the next of kin were not within the consideration of the marriage, and were mere volunteers, and as such not themselves entitled to enforce the covenant and agreement, and therefore the Court ought not to direct the trustees to take proceedings to enforce the covenant and agreement so as to do indirectly, what it would not do directly.

ARBITRATION—ACT GIVING ARBITRATORS FULL DISCRETION AS TO COSTS—POWER TO ORDER SUCCESSFUL PARTY TO PAY COSTS.

Gray v. *Ashburton* (1917) A.C. 26. In arbitration proceedings under a statute which gave the arbitrator discretion as to costs, and which directed that, in the exercise of such discretion, the arbitrator was to take into account, *inter alia*, "the reasonableness or unreasonableness of the claim of either party in respect of amount or otherwise," the Court of Appeal (1916) 2 K.B. 353 held that the discretion ought to be exercised as is the discretion of the Court in actions, and, therefore, that a successful party could not properly be ordered to pay costs. The House of Lords (Lords Loreburn, Haldane, Atkinson, and Shaw) hold that the discretion of the arbitrator is unlimited, and that, in the absence of proof of misconduct, or want of jurisdiction, the award could not be set aside. In arriving at this conclusion, considerable doubt seems to be thrown on *Foster* v. *Great Western Ry.*, 8 Q.B.D. 515; and inferentially on *Higgins* v. *Higgins*, 1916, 1 K.B. 640.

Reports and Notes of Cases.

Province of Ontario

SUPREME COURT.

Middleton, J.] C. v. C. [33 D.L.R. 151.

Conflict of laws—Foreign divorce.

The exercise by a foreign Court of the general jurisdiction it is admitted to have under principles recognized by English law will not be inquired into in proceedings in English Courts.

See *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.

Bain, K.C., *White*, K.C., and *M. L. Gordon*, for plaintiff; *Dewart*, K.C., and *Harding*, for defendant.

ANNOTATION ON ABOVE CASE FROM D.L.R.

The Illinois statute requires residence in the State for one year *next before* the commencement of proceedings, to give jurisdiction, or commission within the State of the offence complained of, or whilst one of the parties resided there. In this instance the complaint made was of an offence committed in Chicago whilst the parties resided there, but this had been condoned by subsequent cohabitation in Ontario. The later offences if conclusively proved would revive the cause of action which had been abated by the condonation. (*Moorhouse* v. *Mo rhouse*, 90 Ill. App. 401; *Sharp* v. *Sharp*, 116 Ill. 509.) If no mention of the condonation and subsequent offence were made in the petition, a fraud was practised on the Illinois Court, by suppression of the truth, yet Middleton, J., says: "The offences complained of were committed in Chicago. . . All the material facts were before the Chicago Court. . . That subsequent offences were committed out of the State (after condonation of those complained of) seems to me immaterial;" that is, that it was immaterial to mention the condonation, and prove the offences which revived a lost right of action. The truth is, that unless later offences had revived the cause of action alleged, that cause was lost by condonation, and therefore the late offences were not only material, but without strict proof of them no decree could have been procured. In alleging these offences, Middleton, J., seems to have relied upon the undisputed evidence of the wife, on a point not at issue in *C* v. *C*; since it is unlikely that the husband in his evidence in *C*. v. *C*. was asked or admitted these later offences.

The question of domicile of choice was vital in this case, because the marriage was "English," in that sense of the word which makes the English Courts so jealously regard proof of acquired domicile. The marriage had been celebrated in Ontario, between parties domiciled there, who continued

to reside there for years, and returned there after a brief and unhappy residence in Chicago. The husband had gone to Chicago to get work, he gave up his job to wait upon the death of his father in Ontario, and he remained there in charge of property he then acquired, and was actually residing there when the divorce proceedings were commenced, going to Chicago for the purpose of being served with the papers which initiated the proceedings. Five days after the divorce was granted, the divorcee married again, and a few months later the divorced husband also married a woman he had met before the divorce. Middleton, J., said there was no proof of "collusion"; it can hardly be said there was no proof of mutual "accommodation." Middleton, J., also said: "There is much to lead to the conclusion that the husband never in fact changed his domicile of origin (Ontario). He seems to have been a rolling stone moving in the line of least resistance, making his abode where it was easiest to obtain a living." That language seems to very exactly describe the facts, yet, the Judge found that a domicile in Chicago had been acquired, and a domicile is required to be "permanent," "bonâ fide," "real" and "existing," to use the language of the ruling cases, in order to give jurisdiction which English Courts will recognise.

The question of reversion to the domicile of origin was not dealt with by Middleton, J., except that he says: "The temporary absence of the *married pair* in Ontario, without intention of abandoning the Chicago residence, did not, I think, defeat the jurisdiction, and beyond this, the offences or injuries complained of were committed in the State whilst both resided there." This seems misleading, for the wife "left him" in Chicago, and went to Ontario and they did not live together again until he came to Ontario. When she did return to Chicago, it was temporarily, for the sole purpose of getting a divorce. Furthermore, reversion to domicile of origin would result from the husband's abandonment of the Chicago domicile of choice, and while the fact that the offence was created in Chicago whilst the married pair resided there would give statutory jurisdiction to the Chicago Court to decree a divorce (sec. 2), English law does not recognise jurisdiction based on anything else than "domicile," within the English meaning of that word. The Judge therefore mixed two matters, in the words just quoted.

What the intention of the husband was in leaving Chicago, or what intention he had formed as to domicile, prior to the application for divorce, should be gathered from his acts and surrounding circumstances, and not from his own evidence, since the manifest necessity he was under of justifying his own conduct made his evidence untrustworthy (per Cairns, C., in *Bell* v. *Kennedy*, (1868) L.R. 1 Sc. & Div. 313). Middleton, J., says: "The husband inherited some property upon his father's death (February), and stayed in Ontario to manage it, and abandoned his intention of returning to Chicago. . . . Divorce proceedings were instituted in March. . . . Afterwards he lived some years in Ontario." The fact that the decision to remain in Ontario was caused by the need of caring for the property acquired in February, establishes almost conclusively that the intention to abandon the Chicago domicile was formed before the divorce proceedings were commenced in March. If so, the domicile of origin (Ontario) had revived, and English law would not recognise any jurisdiction in the Chicago Courts to decree the

divorce (6 Hals. 193). To admit that it was the coming of the property into his possession which caused him to decide to remain in Ontario, and then to postpone the date when he formed that intention until he had gone to Chicago to be served with the divorce paper, is too accommodating altogether. It seems quite clear that both parties wanted a divorce, that it would be difficult to get it from the Canadian parliament, and that to allege a continuing domicile in Chicago was very tempting.

The concluding remarks of Middleton, J., that because all the parties concerned knew what they were about when the divorce was obtained, there should be a conclusion favourable to the legality of the decree, suggests the existence of an estoppel against the defendant, but the public interest is the main thing to be guarded, and estoppel has nothing whatever to do with the matter. If all the parties hnew what they were about, there could be no estoppel of one by the other. A marriage claimed and denied on the ground of an existing marriage; a foreign divorce pleaded, and its legality denied for want of jurisdiction; the question of law should be settled on principles aimed only to preserve the morality of married life.

The unusual directions as to costs given in the main judgment, considered in the light of the later explanation, evidence a very keen and not unnatural sympathy by Middleton, J., with the plaintiff, and suggest that his findings were influenced thereby. "Hard cases make bad law," and no harder cases arise perhaps than cases of this kind; judgments establishing the nullity of proceedings long before inevitably impose hardships; nevertheless preservation of the public interest in the binding nature of the marriage tie and strict examination of all foreign divorce, will in the end prevent more private suffering than will regard for the hardships of particular instances.

Province of British Columbia.

SUPREME COURT.

Murphy, J.] MILLER v. ALLISON. [33 D.L.R. 144.

Conflict of laws—Foreign divorce—Remarriage abroad.

Where a British subject domiciled in this country enters into a contract of marriage during a temporary visit to a foreign country, the question of the validity of marriage, as to essentials, not as to form, depends upon the laws of this country.

McDiarmid, for petitioner; *Higgins*, for respondent.

ANNOTATION ON ABOVE CASE FROM D.L.R.

The judgment in this action was wrong.

When she procured a divorce in Oregon, the respondent was domiciled in Idaho. The whole question of the validity of the divorce depends upon the law of Idaho in reference thereto.

"The English Courts will recognize the binding effect of a decree of divorce obtained in a State in which the husband is not domiciled if the Courts of his domicile would recognize the validity of the decree:" *Armitage* v. *A.-G.* [1906], P.D. 135.

The petitioner, a British subject, residing and domiciled in Victoria, B.C., went through a form of marriage with respondent in the State of Washington, U.S.A. and returned to Victoria to reside.

The respondent also resided in Victoria, B.C. prior to and at the time of the ceremony with petitioner, but her husband, during the same period, and at the time of the ceremony, was domiciled and resident in the State of Idaho, U.S.A.

Prior to the said ceremony the petitioner made transient visits to the State of Oregon, U.S.A., and succeeded in obtaining from the Courts of that State a decree of divorce.

It was found as fact by Murphy, J., that by the law of Oregon, one year's continuous residence in the State is necessary to give its Courts jurisdiction to decree divorce, and that the petitioner had not so resided for the requisite time.

The jurisdiction of the B.C. Court to declare the form of marriage between petitioner and respondent null and void cannot be questioned, for petitioner was domiciled in British Columbia at the time of the marriage, and of the trial, and the respondent, who resided there, claimed to be domiciled there also, by virtue of the alleged marriage to petitioner.

The question, however, of what laws were to be regarded in deciding upon the validity of the ceremony of marriage is quite a different one from that of jurisdiction, and, with respect, it cannot be conceded that the reasoning by which Murphy, J., reached his conclusion was altogether sound.

He quoted *Brook* v. *Brook*, 9 H.L.C. 193, that the essential validity of a marriage is governed by the law of the domicile, not the law of the place of marriage, as authority for his holding that as the petitioner was domiciled in B.C., the Courts there could construe and apply the law of Oregon as to divorce, but that was a case in which the capacity of a person domiciled in England to contract a marriage outside of it was in question, and here there was no question whatever as to the capacity of the petitioner, the party domiciled in B.C., but of the respondent, whose domicile was in the State of Idaho at the date of the ceremony with petitioner. The question before Murphy, J., was not, was the petitioner capable of marriage, for that was undeniable, but was the respondent capable, and the answer to that depended upon the other question, had she been validly divorced according to the law of her domicile?

"The validity of a divorce depends upon the *lex domicilii.*" (Eversley, 3rd ed., 482). "The domicile for the time being of the married pair when the question of divorce arises affords the only true test of jurisdiction to dissolve their marriage, and such a divorce will be recognized by the English Courts even if granted for a cause which would not have been sufficient in England." (*Bater* v. *Bater*, [1906], P.D. 209.) "The domicile of a married woman is the same as that of her husband." (Brown and Watts on Divorce, 8th ed., 7). The domicile of the respondent's husband at the time of her divorce was in Idaho. If the

divorce was legal there, it was legal in British Columbia. In that case, she had capacity to marry, according to English law, and the marriage in the State of Washington, if valid as to form, was valid in British Columbia, and petitioner became her husband.

Murphy, J., regarded as irrelevant, the question as to the law in the States of Washington and Oregon, except as to the statute of Oregon requiring residence by a petitioner, because of his reading of the decision in *Brook* v. *Brook* (*supra*), and gave no consideration whatever as to the law of Idaho. But this was the real question, was the Oregon divorce of a woman domiciled in Idaho legal by the laws of Idaho? That was, of course, a question of fact within the authority of Murphy, J., to decide, but no evidence concerning it appears to have been given at the trial, and therefore, upon appeal, this case should be sent back for a new trial. It is not unlikely that, according to the laws of Idaho, the divorce granted in Oregon, in this case, would be null and void, on the facts as found by Murphy, J., but Idaho Courts might consider that the apparent defect in the jurisdiction of the Oregon Courts, on the ground of non-residence for the statutory period, was cured by the appearance and submission of the husband, and the law of Idaho was a question of fact as to which evidence should have been given and a finding made by Murphy, J. To illustrate that this was the real point—suppose that by the law of Idaho, the Oregon divorce was good, the husband would be free to marry, and the wife also; *per contra*, if the law of Idaho were otherwise. Suppose Idaho refused to recognize the Oregon divorce of parties domiciled in Idaho, the husband would still be bound in Idaho, and the wife also, but according to the judgment of Murphy, J., the wife would be free in B.C. to marry again, if by the laws of Oregon the divorce were good. The question as to the validity of the divorce according to the laws of the State of Washington, where the form of marriage between petitioner and respondent was gone through, was of course unimportant, though much argued, apparently, by counsel for respondent, for the validity of the form gone through was not questioned. A foreign marriage, good as to form, will be recognized in our Courts, if not prohibited by consanguinity, affinity or previous marriage. (Eversley, 3rd ed., 105.)

DOMICILE.

In all actions involving the validity of foreign divorce an absolutely vital question is, what was the domicile of the husband at the time it was procured? No divorce is entitled to recognition in another State unless the Court had jurisdiction by reason of the *bonâ fide* and permanent domicile: *LeM.* v. *LeM.*, [1895] A.C. 531; *Re Sinclair*, [1897] A.C. 469.

"The domicile . . . when the question of divorce arises affords the only true test of jurisdiction to dissolve their marriage (*Bater* v. *Bater*, [1906], P. 209; *Ramos* v. *Ramos*, 27 T.L.R. 515).

"The English Courts will recognize as valid the decision of a competent foreign Christian tribunal dissolving the marriage of a domiciled native in the country where such tribunal has jurisdiction. (*Harvey* v. *Farnie* (1880), 5 P. 153 (1882), 8 A.C. 43).

It is recognized in *Bater* v. *Bater* (*supra*), at p. 217, that the question of nationality is of no importance. (See Eversley on Domestic Relations, 3rd ed., 483.)

The decree of a foreign Court, which has jurisdiction, can undo an English marriage on grounds short of those essential in England. *Bater* v. *Bater*, *supra*; *Harvey* v. *Farnia*, *supra*; *LeMesurier* v. *LeMesurier*, *supra*.

Three important considerations present themselves in each action involving domicile: (1) what is domicile; (2) how is it acquired; (3) how lost.

As to (1):— WHAT IS IT?

Domicile is residence at a particular place with intention to remain there permanently, or indefinitely. (Law of Domicile: Phillimore.) Residence in the place which is in fact the permanent home. (Conflict of Laws: Dicey). Habitation in a place with intent to remain there forever, unless some circumstance should occur to alter that intention. (*Whicker* v. *Hume* and others (1858), 7 H.L.C. 124.) Domicile is a combination of residence and an intention of remaining for an indefinite time. (*Lord* v. *Colvin*, 28 L.J. Ch. 366; Eversley, 3rd ed., 472.)

Domicile is sub-divided into three classes:—(a) of origin, (b) ascribed by law, (c) of choice.

(a) A person's domicile of origin is that which the father had at the birth of the person; not necessarily the place of birth, for the father may have been domiciled elsewhere. If the father be dead, the child takes the domicile of the mother. During minority, the minor's domicile is that of the parents. The last domicile of a minor continues after minority ceases until changed by his own act. No person can be at any time without domicile, or have more than one. If the domicile ascribed by law (that of the parents), or acquired by choice, be abandoned, the domicile of origin revives. It does so easily. (*Bempde* v. *Johnstone*, 3 Ves. 198; *Hodgson* v. *De Beauchesne*, 12 Moo. P.C. 285.) There is a presumption of law against an intention to abandon the domicile of origin (*Ibid*).

(b) Domicile is ascribed by law for married women and minors.

As to (2): HOW ACQUIRED.

(c) A domicile of choice is acquired by an independent person by residence in a place with an intention of remaining permanently, or for an indefinite time. There must be a fixed and settled intention of abandoning the domicile of origin. Mere length of residence abroad (and employment there) is not sufficient evidence of this intention (*Winans* v. *A. G.*, [1904] A.C. 287; *Huntley* v. *Gaskell*, [1906] A.C. 56). It is an inference of law derived from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. (*Udney* v. *Udney*, L.R. 1 Sc. App. 441.)

In *C.* v. *C.* (*post*, p. 151), Middleton, J., said:—"Looked at in the light of all the events, there is much to lead to the conclusion that (the husband) never in fact changed his domicile of origin. He seems to have been a rolling stone, moving in the direction of least resistance, and making his abode where it was easiest to obtain a living, but this is not the way in which the matter (of domicile) should be approached." It is submitted that this was the very way to approach the matter, and that the conclusion, subsequently reached, that the husband acquired a domicile, was absolutely inconsistent with the doubt that he had abandoned his domicile of origin. No person can have two domiciles (Dicey), so that if that of origin had not been aban-

doned, one of choice was not acquired. The presumption is against abandonment of the domicile of origin, and the existence of a doubt about it should be conclusive against it. To say that a man is a "rolling stone" is equivalent to saying he had not an acquired domicile. How can "a rolling stone" have a permanent home?

Domicile is an inference of law, but intention a question of fact—the difficulty of deciding as to whether a domicile of choice has been acquired is in shewing the intention to remain where residence is taken up, or of relinquishing a domicile in existence. (*Re Stern*, 28 L.J. Ex. 22.) The onus of proving an intention to abandon a domicile of origin rests on those who assert it (*Briggs* v. *Briggs* (1880), 5 P.D. at p. 164; *Jones* v. *City of St. John*, (1899) 30 Can. S.C.R. 122; *Seifert* v. *Seifert*, 23 D.L.R. at p. 445; *Huntley* v. *Gaskell*, [1906] A.C. 56; *Winans* v. *A. G.* (*supra.*)

The question of intention being one of fact, it will be profitable to consider what acts have and have not been regarded as proving intention. In *Bater* v. *Bater*, *supra*, intention to acquire a permanent home in New York was based upon evidence that a husband had left England without an intent of returning, had rented and lived in a house in New York, and had become naturalized there. In *LeMesurier* v. *LeMesurier*, *supra*, it was held that a "permanent" residence was necessary to prove intention, and that *bonâ fide* residence alone did not give "the degree of permanence required." *Firebrace* v. *Firebrace*, 4 P.D. 63, may be usefully perused for its collection of facts regarded as of value in deciding as to intention.

English Courts were formerly inclined to rule that an English marriage was indissoluble by a foreign Court of the domicile. (*Lolley's* case, Russ. & Ry. 237; see arg. in *Harvey* v. *Farnie* (*supra.*) This rule has finally given place to the broader one, that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage" (*LeMesurier* v. *LeMesurier*, (*supra*); *Rex* v. *Woods*, 6 O.L.R. 41, 7 Can. Cr. Cas. 226).

Nevertheless, it is important to note that the prevailing reason for this change of view was that "the differences of married people ought to be adjusted in accordance with the laws of the community to which they *belong* (by domicile)" (*Bater* v. *Bater*, *supra*). In ascertaining what is the true domicile, English Courts construe that word in its English sense. In many States in America, residence and domicile are not clearly distinguished (*Bater* v. *Bater*, *supra*, at p. 214). In some States, "residence" is by statute made sufficient to found jurisdiction to grant divorce. Such a divorce would not, it is suggested, be recognized in any English Court if the domicile were shewn to be elsewhere when the divorce action was instituted, unless, indeed, it was in a country which would recognize the divorce (*Armitage* v. *A. G.*, *supra*). Certainly it would not be recognized if the domicile were in any English jurisdiction.

In *Rex* v. *Wood*, 25 O.L.R. 63, 19 Can. Cr. Cas. 15, there was a prosecution for non-support of wife. The defence was a divorce obtained in the Ohio Courts. The defendant was married in Ontario, in 1903, and the divorce procured in 1910. The jury had found that the defendant did not acquire an actual and permanent domicile in Ohio. In the judgment of the

Court, delivered by Meredith, J.A., it is said: "There is nothing, in the decree or otherwise, to shew that the question of domicile was considered in the Ohio Court, or that the jurisdiction of that Court, to pronounce such decree, at all depended upon domicile; and, if there had been, I am far from thinking that such facts would have precluded the Courts of this province from inquiry into the fact, or from dealing with the rights of the parties upon their own findings respecting it.'

It follows from the jealous care which English Courts have always shewn for the parties to English marriages, from the slow growth of the rule which now recognizes dissolution by foreign Courts of such marriages, from the insistence that "domicile" shall not be confounded with "residence," but shall be construed in the English sense, and that it shall be "real," "*bonâ fide*," "permanent" and "existing" when the proceedings for divorce are taken, that the burden of proof upon one who asserts the validity of a foreign divorce is a heavy one, and that if doubt exists, it should be resolved against the divorce. *Wilson* v. *Wilson*, 2 P. 435; *Bell* v. *Kennedy*, 1 Sc. App. 307; *Wadsworth* v. *McCord*, 12 Can. S.C.R. 469; *Manning* v. *Manning*, L.R. 2 P. 223.

Residence alone is not sufficient for domicile. There must be the necessary *animus manendi*. The change of domicile must be with an intention to make the place the main and permanent establishment *sine animo revertendi*. *Hadlane* v. *Eckford*, L.R. 8 Eq. 631; *Hoskins* v. *Matthews*, 8 De G. M. & G. 13; *Atty.-Gen.* v. *Dunn*, 6 M. & W. 511; *Re Capdevielle*, 2 H. & G. 985; *O'Meara* v. *O'Meara*, 49 Que. S.C. 334; *Adams* v. *Adams*, 11 W.L.R. 358.

Neither length of time nor intention, taken separately, will do to establish a change of domicile, although the two taken together may work a change. The residence of a travelling salesman for the period of one year and a month, coupled with his affidavit of his intention as to permanent residence, does not establish a sufficient change of domicile for jurisdictional purposes in a divorce proceeding. *Walcott* v. *Walcott* (1915), 23 D.L.R. 261, 48 N.S.R. 322.

In *Adams* v. *Adams*, 14 B.C.R. 301, the petitioner, in 1895, when aged about 19, came from Ontario to British Columbia, where he spent some 3 or 4 years in different places. In 1899 he married, and at once removed to the Northwest Territories. In 1907, satisfied of his wife's infidelity, he made her leave for New York. In autumn, 1908, he returned to Vancouver, and took a position in a mercantile house. In January, 1909, he filed a petition for divorce, alleging domicile in British Columbia. It was held that no domicile was acquired to enable him to sue for divorce.

Retaining property in the domicile of origin, or attending and managing the paternal estate therein, shews an intention not to abandon it. In *Lord* v. *Colvin*, 4 Drew 366, a person born in Scotland, resided many years in India, returned to Scotland and lived in his paternal estate for 6 years; then resided in France for 6 years. He was said to have preferred France, and to have been annoyed by his neighbours in Scotland. He had handsomely furnished apartments in Paris. He never let his paternal estate, and attended to the management of it. It was held that he had not abandoned his Scotch domicile. See also *Maxwell* v. *M'Clure*, 3 Macq. H.L. 852.

As to (3): REVERSION TO DOMICILE OF ORIGIN.

Slighter evidence is required that a man intends to abandon an acquired domicile than that he intends to abandon a domicile of origin. *Lord* v. *Colvin*, 28 L.J. Ch. 361. This is doubtless because the Courts of the domicile of origin have what may be called a natural jurisdiction, and inasmuch as they unwillingly concede loss of jurisdiction where a party has acquired a foreign domicile, they gladly assert a return to the domicile of origin, the burden of proof to establish an acquired foreign domicile disappears when an abandonment of it, and a return "home," is proposed.

Akin to this rule, and the reason for it, is the doctrine recently established, that "the rule that 'the domicile of the husband governs the jurisdiction in suits for dissolution of marriage,' may be departed from in proper circumstances," *i.e.*, where nullity has already been declared in the Courts of the domicile. *Ogden* v. *Ogden* [1908] P.D. at p. 82-3; *Stathatos* v. *Stathatos*, [1913] P.D. 46; *Montaigu* v. *Montaigu*, [1913] P.D. 154.

Province of Alberta.

SUPREME COURT.

Stuart, Beck and McCarthy, JJ.] [33 D.L.R. 1.

GRACE v. KUEBLER.

Vendor and purchaser—Payment of purchase money—Assignment by vendor—Notice—Caveat.

If notice of an assignment by the vendor of his rights under an agreement of sale of land has not been given to the purchaser, payment to the vendor of the balance due under the agreement will entitle the purchaser to a transfer of the land; a caveat filed in the Land Titles office after the assignment is not notice, as such, to the purchaser, who is not bound to search the register before making payment.

Grace v. *Kuebler*, 28 D.L.R. 753, affirmed.

A. H. Clarke, K.C., for plaintiff; *E. A. Dunbar*, for defendant.

ANNOTATION ON ABOVE CASE FROM D.L.R.

The very just and convenient rule of law laid down in this action might have been reached by reasoning less open to criticism, perhaps, than that which was based upon decisions upon the Ontario Registry Act.

The defendants in this action were purchasers under an agreement for the sale of land. A balance due the vendor had been assigned to the plaintiff,

and a transfer of the land to him, subject to the agreement of sale, had been executed, but not registered. He had filed a caveat in the Land Titles Office, setting forth that he was interested under a transfer, and subsequently the defendants, who had no actual notice of the assignment, paid to the vendor the balance due on the land. The plaintiff (assignee) sued the defendants (purchasers) for the said balance, and the defendants counter-claimed for a transfer, which was ordered. The real question at issue was, did the caveat constitute notice to the defendants of the assignment to the plaintiff?

The Land Titles Act makes this provision for a caveat: "Any person claiming to be interested . . under any instrument of transfer . . in any land, mortgage or encumbrance, may cause to be filed a caveat in form 'W' . . So long as any caveat remains in force the registrar shall not register an instrument purporting to affect the land, mortgage or encumbrance."

It will be noticed that no provision is made by the Act that a caveat shall, as such, be "notice" to anybody for any purpose, and it is maintainable that it is not even constructive notice to a person subsequently acquiring an interest in land, as registration under the Ontario Registry Act would be. Notice or no notice may be a question of fact only.

Sec. 41 of the Land Titles Act says: "After a certificate of title has been granted for any land, no instrument until registered under this Act shall be effectual to pass any estate or interest in any land (except a leasehold for 3 years or less) or render any such land liable as security for the payment of money." Therefore the parties in this action came before the Court in effect as persons claiming adversely, the defendants for a transfer and registration, the plaintiff to be paid before transfer or registration the balance due under the agreement for sale at the date of its assignment. As against each other they had equitable rights, and both being innocent, the only question was, which had the better equity?

The defendants could say to the assignee, "the moment there is a valid contract for the sale of land, the vendor becomes in equity a trustee for the purchaser (*Shaw* v. *Foster*, L.R. 5 E. & I. App. 321; *Raffety* v. *Schofield*, [1897] 1 Ch. 937), and upon completion of the payments is bound to convey the legal title (*Baldwin* v. *Belcher*, 1 Jo. & Lat. 26). When you took an assignment from the vendor with notice of the previous bargain and sale, you assumed the position of our trustee (*Taylor* v. *Stibbert* (1794), 2 Ves. Jr. 437), and hold the transfer for us. As assignee of the vendor's lien for an unpaid balance of purchase money, you have no claim against us or the land, for the money has been paid to the vendor, and we had not the notice you were bound to give, if you wished to bind us (*London & County Bank* v. *Ratcliffe* (1881), 6 App. Cas. 722, and see *Niola* v. *Bell*, 27 Vict. L.R. 82; *Queensland Trustees* v. *Registrar of Titles*, 5 Q.L.J. 46, and *Peck* v. *Sun Life Ins. Co.*, 11 B.C.R. 215).

Against this argument what had the plaintiff to offer except the suggestion that the caveat he had filed constituted notice to the defendants that he had acquired a right to the balance then unpaid, and even as to that he would have to admit that if anything had been paid between the date of the assignment and the filing of the caveat, he had no claim for it.

The Land Titles Act (sec. 97), says that registration of a caveat shall have the same effect, as to priority, as registration of the instrument under which the caveator claims. But suppose the plaintiff had filed his transfer from the vendor, would not a Court have been bound to decree, under the circumstances, that he held the land as trustee for the defendants, and was bound to transfer to them? McCarthy, J., says that had the plaintiff registered his title, he could not have been deprived of it except, under sec. 114 of the Act, for fraud, and the plaintiff had not been guilty of fraud. But, aside from the point that registration by the plaintiff with intent to hold the land as his own would have been fraud (*McDonald* v. *Leadley*, 20 D.L.R. 157), the Court would have power to order the plaintiff as trustee for the defendants to make a transfer to them, and action under sec. 114 would not be necessary (*Tucker* v. *Armour*, 6 Terr. L.R. 388).

McCarthy, J., referring to the fact that the land was subject to certain mortgages, which the purchasers had agreed to assume, argued that a duty was thereby cast upon the purchasers, to search the registry, and a search would have disclosed to them that the plaintiff had filed a caveat, and upon the assumed existence of such a duty he based the contention that the caveat was notice to the defendants. The statement of the argument seems to answer it; if it were good, notice or no notice by caveat would depend upon the existence of circumstances creating a duty upon the part of the person it was supposed to notify. The alleged duty of the defendants was to themselves, not to the plaintiff; if they trusted the vendor implicitly, it did not lie in the mouth of his assignee to reproach them. If he could not say, you trusted me, it was your duty not to do so, therefore by paying me imprudently, you have lost your money, how could his assignee say so, charged, as he was, with the same equities, and having, as against the purchasers, no right of his own prior to notice to them of the assignment?

Discussing the Ontario cases referred to by the other Judges, as settling that the Registry Act of Ontario did not make registration of an assignment of a mortgage notice to the mortgagor, McCafthy, J., said, that—they were based upon the words of the statute, and that "the registered title is in a mortgagor, whereas a purchaser has no registered title," and therefore should search the register. The fact is, of course, that the rule that "an assignment will not bind the person liable until he has received notice" (Anson on Contracts, 8th ed. 293; *Stocks* v. *Dobson*, 4 De G. M. & G. 11, 15, (43 E.R. 411), was established where and when there were no Registry Acts. The cited Ontario cases merely (1) decided that a mortgagee discharging a first mortgage was not affected with notice of a second mortgage (*Trust & Loan Co.* v. *Shaw*, 16 Gr. 448), and (2) suggested that a mortgagor was, perhaps, not affected with notice of an assignment of a mortgage by the registration thereof (*Gilleland* v. *Wadsworth*, 1 A.R. (Ont.) 82). These decisions, it is true, rested upon the words of the Registry Act, but in this sense only, that but for the words thereof there could have been no doubt whatever that registration was not notice.

The suggestion by Moss, J.A., was not essential to the judgment, and has, therefore, no binding force.

Stuart, J,, referring, apparently, to the fact that the vendor had executed a transfer to the assignee, expressed the opinion that it was reprehensible

for vendors so placed to so "transfer the land," though quite proper to assign the debt due, for, said he, the vendor thereby puts it out of his power to fulfil his contract, and, perhaps, the purchaser has entered into the contract on the strength of his faith in the personality of the vendor, and the assignee may be a person more difficult to obtain a title from. Later on he said, "the vendor has no right to convey the legal estate to the assignee (*i.e.*, no power, in equity), and he proceeded to question whether any interest in the land would be conveyed by a (registered) transfer made under such circumstances, upon the ground, apparently, that the vendor had in equity parted with the title by the agreement to sell. We venture to think that this opinion and the arguments upon which it is based will not be assented to generally. As already pointed out, the agreement of sale did not confer upon the purchaser any interest in the land under the Land Titles Act (sec. 47). Aside from the Act, the agreement conferred only an equitable interest (or claim?). Either under or apart from the Act, the vendor could legally and effectually transfer the land to any person; to a stranger for his own benefit, to one with notice of the agreement for the benefit of the trustee and for his own protection. We have not hitherto seen it suggested that after an agreement for sale, the land could not effectually be transferred to a third party. On the contrary, the practice has been general (*Brown* v. *London Necropolis Co.*, 6 W.R. 188), and its results clearly defined—that an assignee without notice takes a complete title, and one with notice becomes a trustee (Fry, Specific Performance, 4th ed., p. 98). As to the moral right, that would of course depend in each case upon the question of fact whether the vendor was conscious that the purchaser was damaged by the assignment; and generally whether if he were, it was not a risk he voluntarily assumed. A purchaser who knows that a vendor may legally assign land cannot reasonably complain if an assignment be made which he might have prevented, by a caveat or otherwise. Besides, it by no means follows as a fact in general practice that a transfer can be obtained from a vendor more conveniently than from an assignee with notice. The purchaser has in fact neither legal nor moral right to count upon no change being made in the habitat of the vendor before he desires to obtain his transfer—at least no such right as the law should aim to preserve. The vendor may remove to a foreign land, or may die, and nobody would suggest that he should refrain from death or removal because the purchaser would thereby be inconvenienced. The purchaser under an agreement of sale has a right or interest in the land which he can protect by a caveat; the vendor is under a personal liability also; if the purchaser chooses to depend upon the latter, the personal liability remains even after the vendor has assigned the contract, unless the purchaser has assented to the assignment (*British Waggon Co.* v. *Lea*, 5 Q.B.D. 149). What moral reason can there be why a vendor should not assign his rights?

Finally, sec. 101 of the Land Titles Act, providing that notwithstanding anything to the contrary in the contract an agreement for the sale of land shall be assignable, seems to set the seal of the statute law upon trading in land agreements, and renders rather inexplicable the language of Stuart, J., in this connection.

The decision under discussion tends to convenience. The mortgagor or purchaser who had to search the registry every time he made a partial

payment would be very unhappily placed. Partial payments far outnumber all others, and all are protected to some extent by the simple equitable rule that an assignee must notify those affected by the assignment; if the contrary rule prevailed, the inconvenience and uncertainty would seriously hamper the sale of land. Those who do not care to depend upon this rule alone, can register their agreements, or file caveats, as the law may permit, unless the agreements stipulate otherwise. In the case under discussion the plaintiff was the victim of his own negligence.

War Notes.

LAWYERS AT THE FRONT.

The following is a list of those members of the profession who have been reported killed in action, died of wounds, or died in military service, not as yet given in this journal. (See pp. 242, 304, 1915: pp. 200, 239, 328, 405, 1916: and p. 119, 1917):—

Harold Staples Brewster, Lieut. R.F.C., Brantford. Second Year Student. Killed December, 1916.

Samuel Leslie Young, Lieut., Eadengrove. First Year Student. Killed 11th November, 1916.

Harold Gladstone Murray, Lieut. C.F.A., Fort Frances. First Year Student. Killed December, 1916.

Henry Stuart Hayes, Sergeant 26th Battery, C.F.A., Trenton. First Year Student. Killed December, 1916.

William Vincent Carey, Lieut. 19th Battalion, Hamilton. Barrister. Killed 30th September, 1916.

Stewart Cowan, Lieut. 24th Battalion, Sarnia. Barrister. Killed October 1st, 1916.

Walter Gerald Lumsden, Lieut. 38th Battalion, Hamilton. Barrister. Killed 18th November, 1916.

Guy Pierce Dunstan, Lieut. Imperial Army, Toronto. First Year Student. Killed 1st July, 1916.

Duncan Donald McLeod, Captain 49th Battalion, Kitchener. Barrister. Died of wounds, June 8th, 1916.

Maurice Fisken Wilkes, Lieut. 19th Battalion, Brantford. Second Year Student. Killed 15th September, 1916.

Fred Holmes Hopkins, Lieut.-Col. 17th Battalion, Lindsay. Barrister. Accidentally killed January, 1916.

David Wesley Jamieson, Major, Toronto. Barrister. Died 17th July, 1916.

Geoffrey Lynch-Staunton, Lieut. 13th Hussars, B.E.F., Hamilton. First Year Student. Killed in Mesopotamia, 5th March, 1917.

Ernest Reece Kappele, Lieut. 75th Battalion, Toronto. Second Year Student. Killed April, 1917.
Cecil Johnstone Bovaird, Corporal, 82nd Howitzer Battery, Toronto. Barrister. Died of wounds, May, 1917.
Duncan Steuart Storey, Major 162nd Battalion, Midland. Barrister. Died of cancer 25th March, 1917.
George Taylor Denison, Lieut.-Col. Can. Reserve Cyclists, Toronto. Barrister. Killed May, 1917.

The Government has at last decided to do what should have been done long ago, preferably when war was declared, namely: to bring into force the Canada Militia Act with probably some desirable changes. It is also stated that legislation will be introduced to prevent those liable to compulsory service from leaving the country. This would have been of some use a year ago, but now it is like "locking a stable door after the horses are stolen."

We notice in the list of prohibited publications sent to us by the Chief Censor for Canada that one of the prohibited books is entitled "Defeat: the truth about the betrayal of Britain." One can only express surprise that this small volume, an eminently sensible and appropriate publication, should be put on the black list. It is compiled by two of the most loyal and well-informed citizens of the Empire. It has been issued by the hundred thousand in England, and it is said that a large edition is being printed for distribution in the United States. If it is good for English and American readers it cannot be very bad for Canada. The public will insist upon this ban being removed. The objection to it is said to be that it advocates a "dry canteen" in England and commends the action of the Province of Ontario in its recent temperance legislation, and claims that in some way it would injure recruiting. This is absurd, at the present time, for voluntary recruiting has ceased to be.

The war drags on and new and difficult problems present themselves as the weary days go by. As to this we are not surprised to hear the question asked: how can a professedly Christian nation expect victory when there is no sorrow for and no turning away from national sins and a strange indifference to the religious point of view? Is not the statement in the Old Book true to-day: "Behold, the Lord cometh out of His place to punish the inhabitants of the earth for their iniquity"? These are days for sober thought for all of us, as well as days of bitter sorrow for many of us, and increasingly so as the casualty lists come in.

Canada Law Journal.

VOL. LIII. TORONTO, JUNE, 1917. No. 6

SUPPLEMENTAL RELIEF.

The case of *Hoffman* v. *McCloy*, 38 O.L.R. 446, deals with a somewhat important question of practice which it leaves in a rather doubtful position because it is not very clear whether the case can be regarded as an authority on the question of jurisdiction which is the main point discussed in the case, having regard to the dissentient judgment of the learned Chief Justice of the Common Pleas on that question, notwithstanding the fact that he actually concurred in the result arrived at by the majority of the Court.

The point involved was comparatively simple and the difference of opinion was, we think, due to the fact that the majority of the Court approached the question from a Common law standpoint and the learned Chief Justice from an Equity one.

The facts were as follows: In 1915 the plaintiff brought the action against the defendant alleging an agreement between the plaintiff and defendant by which the plaintiff was to be entitled to receive part of the proceeds to be derived from the sale of a patent. The plaintiff's share being alleged to be one-fifth of the receipts until the defendant should have received $1,500, and then the remainder of the receipts. The plaintiff alleged a sale had been made under which the defendant had received $1,500 and was to receive a royalty of $1.50 for each machine manufactured. At the trial in May, 1915, the plaintiff recovered a judgment for $150, with costs on the County Court scale; and the Court made a declaration that he was entitled to 20 per cent. of all royalties thereafter received by the defendant from the purchasing company after that company should be recouped for the advance payment of $1,500.

In October, 1916, the plaintiff gave notice of motion for an order to take an account of the amount received by defendant by way of royalties since the judgment, and the late Chancellor made the order asked, reserving further directions and the question of costs until after the report.

It was this order which was the subject of appeal. The majority of the Court (Riddell, Kelly, and Masten, JJ.), allowed the appeal on the ground that there was no jurisdiction to make the order, and Meredith, C.J.C.P., held that there was jurisdiction to make the order, but, in the circumstances, the order should not have been made.

It is on this point of jurisdiction that the case has to be considered. The order appealed from was attempted to be supported under Rule 65, and *Meyers* v. *Hamilton Provident, Etc.*, 15 P.R. 39; this case the majority of the Court held ought not to be followed. Mr. Justice Riddell refers to *Witham* v. *Vane*, 1884, W.N. 98, where Pearson, J., in an action refused to make a supplemental order for an account in respect of breaches of the covenant subsequent to the judgment. Riddell, J., also thought the case was governed by what was decided in *Stewart* v. *Henderson*, 30 O.L.R. 447, where the Court set aside so much of the judgment appealed from as directed an inquiry as to moneys thereafter received by the defendant in respect of which the plaintiff would be entitled to a commission. Mr. Justice Masten, besides relying on this case, also bases his judgment on the ground that the moneys now claimed, not being due when the action was commenced, cannot be recovered in the present action. No doubt it is the strict rule of law, that only the rights of the plaintiff as they existed at the date the writ issued can be adjudicated. But although as a general proposition that may be said, is it not a rule that is subject to some exceptions even at law? For instance, in the common case of interest payable on a covenant, it is the ordinary practice to give judgment for interest which has become due after the issue of the writ, and before judgment, as well as in the case where it is allowed by way of damages subsequent to the date of the writ. But in equity, es-

pecially in cases of account against trustees, and other persons standing in a fiduciary position, the judgment always directs the account to be taken in such a way as to cover not only all receipts up to the date of the writ, but also all moneys received up to the taking of the account, and also of all prospective receipts until the winding-up of the trust. Indeed any other procedure might involve an endless series of actions. The action of *Witham* v. *Vane, supra,* though brought in the Chancery Division appears to have been in substance an action on a covenant, and probably on that ground was properly governed by Common law principles, which would not be applicable to other cases where an account is sought. The case of *Stewart* v. *Henderson, supra,* may also be said to have been a common law action and in like manner governed by common law principles. *Hoffman* v. *McCloy,* on the other hand, seems to have been of an equitable nature, the defendant apparently being trustee or agent or partner of the plaintiff and as such accountable to him for his proportion of the moneys received and to be received in respect of the sale of the patent; and what the plaintiff sought was a declaration of his right, and an account by the defendant as his trustee or agent, or partner.

The judgment of the Court at the trial of the action declared the plaintiff's rights, and awarded payment of the amount then actually in the defendant's hands belonging to the plaintiff, but omitted to direct an account of future receipts by the defendant for the plaintiff. The majority of the Divisional Court was of the opinion that the judgment could not properly have contained such a direction, although it is, we think, the common practice in the case of trustees, or agents or partners to order such accounts.

It is not very clear from the report in what position the defendant stood to the plaintiff. A patent for an invention had apparently been sold by the defendant and by virtue of some agreement between the plaintiff and defendant the latter was bound to account to the plaintiff for a certain proportion of the proceeds of the sale; but, in whatever position the defendant

may have been in regard to the plaintiff, it seems clearly to have been a fiduciary position of some sort, and, for aught that appears to the contrary, a direction for an account by the defendant of moneys received and to be received in his fiduciary character, would seem to have been a direction which might properly have been made by the original judgment in the action, if asked, and having been omitted in the judgment it seems a fitting subject for a supplementary order. It is to be observed that the order was made by the late Chancellor than whom no more expert equity practitioner was on the bench, and his jurisdiction to make it was affirmed by the learned Chief Justice of the Common Pleas, who was also an expert practitioner in the former Court of Chancery, and the order is found to be *ultra vires* by three Judges, none of whom, we believe, ever practised in equity.

The notion that an account in equity is limited to the receipts up to the date of the commencement of the proceedings is manifestly erroneous. In the last edition of Daniels Pr., p. 915, we read, speaking of the mode of taking accounts of agents, or personal representatives, or trustees: "The account should include any sums received or paid since the judgment, and if necessary a further account, or further accounts, should be brought in so as to bring down the account to the time the Master's certificate is made." Were the practice otherwise, as we have said, it would lead to an endless multiplication of actions.

It is a well-known practice in the Master's office to make interim reports, *i.e.*, reports up to a particular time, where the account is a continuing one; receivers, trustees and committees of lunatics, as is well known, are passing their accounts and paying over their balances from time to time, and in principle there is no reason why in an account against an agent he might not in like manner be required periodically to account without necessitating new action for each subsequent receipt by him.

We have referred to this subject because it is an instance of

the difficulty which inevitably arises where common law lawyers essay to administer equity procedure; other recent instances might be cited, but we forbear: the particular point of practice involved is important, and it is unfortunate that any doubt should have been cast on what we believe to be a well understood and beneficial procedure.

We may here point out that there are many instances in which the Court is accustomed to give supplemental relief without requiring a new action to be brought, *e.g.*, the appointment of a receiver after judgment by way of equitable execution; the removal of a trustee who, on the taking of his accounts, is found to be in default. Indeed, unless it did constantly exercise this jurisdiction to grant supplemental relief it is hard to say how the Court could effectively carry out the provisions of the Judicature Act, s. 16 (*b*), which provides that: "The Court in the exercise of the jurisdiction vested in it by this Act, in every cause or matter pending before it, shall have power to grant, and shall grant, either absolutely, or on such reasonable terms and conditions as it shall deem just, all such remedies as any of the parties may appear entitled to in respect of any, and every legal or equitable claim properly brought forward by them in such cause or matter, so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

This provision of the Act the Divisional Court did not see fit to refer to although it appears to have a very plain and obvious bearing on the question before it.

*WAIVER.**

The subject of my address has been announced as "Waiver," but that is only my little joke, for there is no such thing as "waiver" —I mean as a distinct legal concept—and that is what I want to say.

About 12 years ago, after I had finished my work on Estoppel, I set myself to study Waiver, but very soon I ascertained that there was not enough "waiver" to write a book about. I first sketched what I had to do as follows:—

> Waiver is entangled with estoppel, election, and contract; and the first step towards separation will be taken when it is observed that it is principally in the law of insurance that waiver and estoppel become involved; in the law of landlord and tenant that waiver and election seem to blend; and in the law of contracts that waiver is confounded with agreement. Closely studying waiver in these three departments, comparing and contrasting it there, with estoppel, election, and contract, will enable us to see what there is in it that is special and peculiar to itself. And let our procedure be to assign to these three departments such cases as properly belong to them, and, examining the rest, see what we can make of them.

Proceeding on these lines, the result arrived at was that nearly all cases of supposed "waiver" could very easily be placed in one or other of the three departments above mentioned. Some had to be assigned to release (in one sense a part of contract), leaving only a few stragglers of negligible character. "Waiver" evidently was an empty category, and modification of the title of the book had become necessary.

REAL "WAIVER."—This general statement must be qualified by the admission that, in the older law, may be found one case of "waife" and one of "waive."

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* The following paper by John S. Ewart, K.C., of Ottawa was read by him at the Annual Meeting of the Ontario Bar Association held in Toronto in February last.

"Waife," translatable into "waiver," was when a pursued thief "waived" or threw away the stolen goods. And "waive" was an outlawed woman—

> left out or forsaken of the law, and not an outlaw as a man is; for women are not sworn in Lutes to the King nor to the law as men are, who therefore are within the law, whereas women are not, and for that cause they cannot be said outlawed, in so much as they never were within it. (*a*).

These are the only sorts of "waiver" or "waive" that I know of; and that is all that I am able to say about them.

DISTRIBUTION OF "WAIVER."—All else that is usually spoken of as "waiver" is, in my judgment, referable to one or other of the well-defined and well-understood departments of the law, Election, Estoppel, Contract, Release. "Waiver" is, in itself, not a department. No one has been able to give it satisfactory definition, or to assign to it explanatory principles. The word is used indefinitely as a cover for vague, uncertain thought.

In enunciating new doctrine of such apparently fundamental character, I cannot restrain a feeling of hesitation and doubt, but I take comfort and courage from varying features of the existing situation: (1) Nobody has yet thought that he knew enough about "waiver" to attempt its exposition in a book. (2) Although many Judges and text-writers have indicated views as to some of the elements of "waiver," there is not only no concensus of opinion, but there is the widest diversity and conflict. (3) Nobody appears to know whether "waiver" is unilateral or bilateral; whether it is the same as election, estoppel, contract, release, or some or one of them; and nobody seems to care.

DEFINITION OF "WAIVER."—The usual definition of "waiver" is "an intentional relinquishment of a known right," but no

(*a*) Termes de Ley, ed. 1642, p. 285; quoted in Stroud's Jud. Dic. 2207. Waifs are *bona waviata*: Stephen's Com., 16th ed., vol. II, 653. And see *Fozley* v. *Annesley*, 1509, Cro. Eliz. 694; 5 Rep. 109, where the word is spelled *waved*.

case can be produced in which a right has been effectively relinquished save by contract, estoppel, or release. And "waiver" appears to be effective only because, being sufficiently loosely defined, it sometimes assumes the garb of one of these and sometimes that of another. "Waiver" is said to have close relations with election also, because, when you choose one thing, you are said to "waive" your right to the other—a right that you never had.

USEFULNESS OF THE WORD "WAIVER."—Notwithstanding what has been said, "waiver" is a serviceable word, and no sweeping condemnation of it is intended. But observe that it is used in three different ways:—

(1) It occurs frequently in general literature and conversation, and, there, its use is entirely unobjectionable. No one would think of disapproving Cowper's line, "She rather waives than will dispute her right." But if we are told that, as a matter of law, she had waived it, our informant might well be asked whether he meant that she had executed a release; and, if not, what had she done?

(2) Technical use of the word as descriptive of a legal situation is indefensible.

(3) Introduction of it into legal discussion, for any purposes, is misleading, and is subversive of general appreciation of correct principle. For lucidity, we must define our terms and use them accurately.

"WAIVER" AND SUCTION.—"Waiver" bears the same relation to scientific law as the word *suction* bears to physics. For although *suction* is a useful word in general conversation, it describes no natural force. And when men tell you that something happened through suction, the word, although possibly conveying the intended idea, must be translated into atmospheric pressure, muscular action, or some other well-known force, before any argument can be based upon it. It is not itself a category. Neither is "waiver."

"WAIVER" AND ELECTION.—The substitution of "waiver" for election has produced very notable disaster in insurance

cases. According to current forms of pleading, an insurance company, when sued for a loss, defends itself by alleging: (1) the clause in the policy providing that the contract shall be void upon the happening of a certain event, and (2) the occurrence of the event; and the plaintiff replies "waiver" of the clause. But that is clearly wrong. The policy does not, upon breach of the conditions, become *ipso facto* void. It is voidable only at the election of the company, and therefore, for valid defence, there must be three allegations: (1) the clause in the policy providing that, upon the happening of a certain event, the company should have *a right to elect* to continue, or to terminate, the contract; (2) the occurrence of the event; and (3) that thereupon the company elected to terminate. Without this last allegation, the plea is obviously insufficient. If the policy read in the way it is construed, no one would think of omitting, from the insurer's defence, the allegation of the fact of election. And to such a plea, "waiver," as a reply is, of course, quite inapplicable.

That all appears to be very clear, but I venture to say that no one here has ever seen a defence with the three allegations in it. And the change from "waiver" to election is not a mere matter of the form of pleading. It extends to three more important results:—

(1) ONUS OF PROOF.—The onus of proof will be changed. Heretofore the burden of proving "waiver" lay heavily upon the insured. Now the insurer must prove election to cancel. For if there be no such election, the contract remains in force.

(2) PROOF OF AGENCY.—Heretofore the insurer had to prove the authority of the person who is alleged to have "waived" the condition. Many a righteous case has failed because of that requirement. Henceforth, the onus is on the company to establish that the official who is alleged to have made the election had authority sufficient for that purpose.

(3) SILENCE-STRATEGY.—Silence-strategy will be no longer available to the companies. At present some Courts say that

a breach of a condition is a forfeiture of the policy, and that a "waiver" of such forfeiture—

> cannot be inferred from mere silence. It (the company) is not obliged to do or say anything to make a forfeiture effectual. It may wait until claim is made under the policy, and then in denial thereof, or in defence of a suit commenced therefor, allege a forfeiture (*a*).

And these Courts are, at all events, consistent in thus holding. For if we assume that breach of a condition has, in reality, "forfeited," in the sense of terminated, the policy, there can be no reason why the company should send notification of any sort to the insured. He knows of the breach as well as the company does (and usually better), and he knows, too, that his contract is at an end. Then why tell him anything?

Other Courts are less consistent, but more nearly correct, when they declare that—

> If the company contemplated the forfeiture of the policy because of the non-payment of the premium, it should at once have so declared, plainly and unconditionally (*b*).

Such language (notwithstanding the misuse of the word "forfeiture") rightly assumes that the breach has no effect upon the policy, and that its termination is the result of the company's election. That being so, the necessity for a declaration by the company is obvious. If the breach ended the policy, then, as I have said, the company could have nothing to communicate to the assured, for he knew of the breach and of its legal effect.

(*a*) *Titus* v. *Glen Falls, etc.*, 1880, 81 N.Y. 419; 8 Abb. N.C. 315. Approved in *Cannon* v. *Home, etc.*, 1881, 53 Wis., 594; 11 N.W. 11. And see *Phœnix, etc.* v. *Stevenson*, 1879, 78 Ky. 161; 8 Ins. L.J. 927; *Smith* v. *St. Paul, etc.*, 1882, 3 Dak. 82; 13 N.W. 355; *Schimp* v. *Cedar Rapids, etc.*, 1888, 124 Ill. 357; 16 N.E. 229; *Queen, etc.* v. *Young*, 1888, 86 Ala. 431; 5 So. 116; *Armstrong* v. *Agricultural, etc.*, 1892, 130 N.Y. 564; 29 N.E. 991; *Petit* v. *German, etc.*, 1898, 98 Fed. 803; *Banholzer* v. *N.Y., etc.*, 1898, 74 Minn. 395; 77 N.W. 295; *Parker* v. *Bankers, etc.*, 1899, 86 Ill. App. 326; *Manhattan, etc.* v. *Savage's Adm'r*, 1901, 23 Ky. 483, 63 S.W. 279.

(*b*) *U.S.* v. *Lesser*, 1899, 126 Ala. 585; 28 So. 646; *Pollock* v. *German, etc.*, 1901, 127 Mich. 460, 86 N.W. 1; 17.

But if it be the election of the company that is the important factor, then the company *has* something to communicate, something of great importance to the assured, and something of which he can have no knowledge unless it is communicated to him by the company.

The effect, then, of the change from "waiver" to election is that silence-strategy will be as obsolete as flint-muskets, and that the law last quoted will be upheld, rather than that which supports the contrary view. If the company want to cancel the policy, it must so elect. It cannot have a live-policy for premium-catching and a dead one for loss-dodging (*a*).

FORFEITURE.—Misuse of the word "forfeiture" must share with "waiver" the blame for the general misconception. By breach of the condition, the assured is said to have forfeited his policy; and, in order to recover on it, he is required to shew that the forfeiture has been "waived." But the breach has not affected the policy in the very slightest. It has supplied merely an occasion for cancelling it. And as there has been no forfeiture, there can be no "waiver" of it.

Follow forfeiture and " waiver" a little further.

(1) Sometimes forfeiture of an estate ensues *ipso facto* upon the happening of an act—the estate terminates or reverts. That is what I call *real forfeiture*, and to it "waiver" can have no application. Restoration cannot be accomplished by "waiver."

(2) When a lessor or an insurance company has, upon the breach of some condition, a right to cancel an existing relationship, and exercises that right, you may, if you will, speak of the lease or policy as having been forfeited; but, if you do, I insist upon your supplying the word forfeiture with descriptive adjectives, and calling it a *completed elective forfeiture*, in order to distinguish it from real forfeiture. To that, too, "waiver" is inapplicable. Restoration cannot be accomplished by "waiver."

(3) From cases in which there is a right to elect to cancel, but in which no election has been made, I plead for the extrusion

(*a*) *Mulchmoor* v. *New Zealand, etc.*, 1901, 64 Pac. 814; 39 Or. 342; *Phœnix, etc.* v. *Lansing*, 1884, 15 Neb. 497.

of the word forfeiture. It is absolutely inapplicable and most mischievously misleading. If you insist upon using the word, put it in the phrase *potential elective forfeiture*, and shew that you at least know what you mean.

WAIVER AND ELECTION.—"Waiver" sometimes produces confusion by pretending to be the reverse of election. For example, Mr. Bishop opens a chapter in his book on Contracts with the words:—

> The law, in all its departments, is constantly presenting to the choice of people its different paths, so that a person who has elected one has waived another. The doctrines of election and waiver, therefore, belong together (*a*).

If you had a choice between a horse and a mule, and you chose the horse, you would not say that you "waived" the mule. For you did not. You had an election between two animals, and, electing to take one, you could do nothing with reference to the other—not even waive it.

You do not "waive" a right to appeal by acting upon the judgment—as is often said (*b*). You elect whether to accept the judgment, or to appeal from it. If you chose to appeal, would you say that you had "waived" your acceptance of the judgment? It is customary to declare that, where goods are tortiously taken and sold, the owner may "waive" the tort and sustain an action in assumpsit for money had and received; but nobody would think of saying that the owner might "waive" his action in assumpsit and bring an action in trespass. The owner had a right to elect; he makes his election; he gives up—he "waives" nothing.

"WAIVER" AND CONTRACT.—Having, as I hope, helped to separate election from "waiver," let me try to disentangle contract from the same evil association.

(*a*) Ed. 1907, p. 326. And see *Warren* v. *Crane*, 1883, 15 N.W. 465; 50 Mich. 300; *United Firemen's, etc.* v. *Thomas*, 1897, 82 Fed. 406; 27 C.C.A. 42; *Supreme Lodge, etc.* v. *Quinn*, 1901, 29 So. 826; 78 Miss. 525; *Gable* v. *U.S. Life*, 1901, 111 Fed. 19; 49 C.C.A. 216.

(*b*) *Videan* v. *Westover*, 1897, 29 Ont. R. 6, note.

Nobody would imagine that one party to a contract could "waive" it. Even if performance of all its stipulations rested upon one party, the contract could not be "waived" by the other party—unless, of course, you choose to substitute the word "waived" for released. But, nevertheless, almost everybody appears to think that performance of some of the stipulations of a contract may be "waived" by the party for whose benefit they were inserted. All the stipulations cannot be "waived," but some of them may. That will not do. The defence to an action for non-performance of some term in a contract may be:—

1. Cancellation of the clause by subsequent agreement.
2. Release from performance.
3. Estoppel to require performance.
4. Accord and satisfaction, or acceptance of substituted performance.

And the idea seems to be that there is, also, the defence of "waiver." If so, what are its elements? Will "waiver" be established by proof of the emission of a few words by the waiverer (is that the correct term?)—words which do not amount to contract or release, and words which are not followed by any consequential action? No case known to me so declares. Every well-decided case of modification of contract by "waiver" can be put upon better ground.

Suggestion to the contrary may be found in cases in which some minor incident of the contract has been omitted—cannot performance of a trifling detail be "waived"? When A says to B, "You need not print the labels in red unless you like," he means one of two things—either (1), "If you do not, I shall not pay you," or (2), "I shall pay you all the same." And if he means the second of these, you may, if you wish to speak colloquially, say that A "waived" the colour of the ink; but you ought to say, that by a new contract the old one had been modified.

The obscuring, and sometimes vitiating, effects of the introduction of "waiver" into the law of contracts is often very obvious. I shall content myself with two instances.

What is meant by the words sometimes used by the endorsers of notes, "presentment and protest waived," we all know quite well. But their use is unfortunate, for it obscures just appreciation of the fact that there are two kinds of contracts which an endorser may make—one that he will pay if the maker do not, and the other that he will pay if the maker do not and if presentment and protest be made. The words "presentment and protest waived" are intended to indicate that the first of these contracts is the one intended, and they manifest that fact by saying that the holder of the note need not do that which would be necessary if the contract were of the kind that it is not. That is stupid and leads to misapprehension.

Confusion rather than misapprehension has been the result of the interjection of the word "waiver" into a section of the English Sale of Goods Act (*a*).

> "Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated."

That extraordinary bungle was caused by the insertion of the word "waive" in the clause as drafted by Mr. Chalmers. The intention was to declare that a purchaser should have the option of insisting upon a condition as a condition, or of treating it as a warranty—for example, as applied to the sale of a horse with a condition of pedigree, that the purchaser might adhere to the condition and return the horse, or keep the horse and sue, as upon a warranty of pedigree. The statute, on the other hand, provides that the purchaser may either "waive" the condition—that is, I suppose, keep the horse, or treat the condition as a warranty, and in that case also keep the horse.

"WAIVER" AND ESTOPPEL.—Estoppel appears to me to have no relation to anything which might be called "waiver," but in the United States they are treated as almost interchangeable

(*a*) 56, 57 Vic., c. 71, s. 11.

terms. The Courts, the digests, and the textwriters all confound them. We are told over and over again that "The terms *waiver* and *estoppel* are ordinarily used both by the Courts and textwriters as synonymous in the law of insurance" (*a*).

In Cyc., vol. 40, p. 255, may be found the following:—

> While "waiver" belongs to the family of estoppel, and the doctrine of "estoppel" lies at the foundation of the law of waiver, they are nevertheless distinguishable terms. It is difficult to make an distinction between "waiver" and "estoppel" which will give to each a clear significance and scope, separate from and independent of the other, as they are frequently used in the cases as convertible terms, especially as applied to the law of contracts and in the avoidance of forfeitures.

For my part, I should say that the very clear distinction between the two things is, that one of them exists as clear, well-defined doctrine, and that the other does not exist at all—save when masquerading as one of the four subjects I have mentioned.

UNILATERAL AND BILATERAL CHARACTERISTICS.—It is, of course, quite impossible that "waiver" can be election, estoppel, contract, and release. If it were identical with any one of them, it would, for that very reason, have little resemblance to any of the others. And it cannot be the same as any one of them.

Commencing with "waiver," we may say that (if it is anything), it is (it certainly used to be) of unliteral character. The possessor of some property throws it away. The effect may be that someone else is benefitted, but "waiver" has no relation to benefits. A watch is thrown away, and some functionary or finder is so much the richer (if the true owner do not intervene). But the "waiver" is complete, although the watch be never found, although it be flung into the ocean.

Election is "waiver's" nearest neighbour, for it, too, is unilateral. But, in election, the act has a legal effect upon the re-

(*a*) Vance on Ins., 1904, p. 343. To the same effect is Richards on Ins., p. 158.

lationship between two persons, or upon the legal right of some party. "Waiver" has no such effect. "Waiver" implies that you have something, and that you are throwing it away. Election, upon the other hand, implies that you have a right to get one of two things, or to occupy one of two positions, by choosing between them.

Release comes next in order; but it is bilateral, inasmuch as it requires concurring acceptance by someone else.

Estoppel is also bilateral, and depends, not merely upon the concurrence of the estoppel-asserter, but upon his consequential action.

Contract is the furthest removed from "waiver" and unilateralism, for it connotes the equal action of the two interested parties.

"Waiver" cannot be all, or like all, of these. If it be identical with any one of them, let us say so, and we shall understand that we have two names for one thing. And if it be not identical with any one, let us so declare, and ascertain, if we can, whether it has any separate and independent existence.

I have found no case of so-called "waiver," and the book which I am now passing through the press is therefore entitled not "Waiver," but "Waiver distributed among the departments, Election, Estoppel, Contract, and Release."

Ottawa. JOHN S. EWART.

NOTES FROM THE ENGLISH INNS OF COURT.

THE COURTS IN WAR TIME.

The legal columns in the daily press and the pages of the law reports might lead one to suppose that even now, towards the end of three years of war, "business as usual" is a maxim of the law. But this is not so. A very large number of the common law cases recently determined have arisen in consequence of the war; while the time of the Chancery Courts, alas! is to some extent occupied with administration suits brought about by the death of our gallant soldiers at the front.

Again, the war has caused new Acts of Parliament to be passed. Hastily drafted, as, in the nature of things, many of them must have been, they are not always easy to construe, and much judicial time has been spent upon them. Finally, new jurisdictions—of which no one ever conceived before the war—have sprung into existence. The decisions of the "Tribunals"—that is to say of those local bodies who decide whether a man shall or shall not be called up for service—may, to some extent, be reviewed in the High Court, as may also the decisions of those who pass judgment on the conduct of munition workers.

Extra-Judicial Duties.

Wholly apart from the functions which they continue to perform in the calm atmosphere of the Bench, His Majesty's Judges are doing much extra-judicial work connected directly or indirectly with the war. There are many tribunals now in existence, of which the public know little or nothing, which are doing work, the value of which will be only appreciated when peace is declared. In work of this kind many of the Judges are actively engaged.

The Lawyers and National Service.

If the Judges are doing their share of that war work which has become the common lot of all classes of the community, what shall be said of the legal profession? Thousands of lawyers are at the front, while of those that remain behind a very large number are helping their country in one way or another. "Jobs" which can only be filled by lawyers are exceedingly numerous. Each of the tribunals above referred to has a Military Representative whose functions can only be performed by a lawyer. Again the compulsory acquisition of property by the Government involves the settlement of claims by lawyers on legal principles. The introduction of universal military service, too, was only carried after a promise by the Government to make provision for the civil liabilities of those called up for service. The determination of the amount to be paid is left to Commissioners

—who are lawyers. And of these there are about 120 working locally up and down the country.

Finality on Questions of Fact.

Vexed questions sometimes arise in this country concerning appeals from County Courts. It is one of the characteristics of these tribunals that the decision of the Judge on a mere question of fact is final. No Kadi under a palm tree was ever more absolute than he who presides in an English poor man's Court! Time was when his jurisdiction was very small—limited to deciding points involving £20 and no more. In those days the fact that there was no appeal from a decision on fact was not important.

Recent statutes, however, have made such changes that now a judgment of an inferior Court which involves up to as much as £100 may be absolutely binding if it is founded on fact, whereas a judgment of "one of His Majesty's Superior Courts of Record" can be reviewed on fact as well as on law. The rule that there is no appeal on fact applies to cases under the Workmen's Compensation Act; and if the County Court Judge is to have the last word in dispensing very large amounts annually in compensation it is of the utmost importance that he shall decide according to law.

Control of Inferior Courts.

This finality has often been criticised. One frequently hears a member of the Court of Appeal: "I do not say that I should have come to the same conclusion as the County Court Judge, but I am bound by his ruling on the facts." It is thus that we often hear of "County Court Justice" as administered in England. Where, however, the Court of Appeal finds that a County Court Judge is trying to arrogate to himself the right to be final on law as well as on fact, he will admonish him. In a recent case a County Court Judge considered an application by the widow of a workman who had met with an accident. The defence was that the necessary statutory claim had not been made in time—that is within six months of the accident. The learned Judge found as a fact that the notice had been given,

and the Court of Appeal (by a majority) approved him. In giving judgment Lord Justice Warrington, who with the Master of the Rolls was for upholding the decision said: "The difficulty is caused by the want of precision in the terms in which the Judge has expressed his opinion, occasioned, I have no doubt, by the view expressed by him that the point was a purely technical matter of no real interest to anybody and had no business bearing on the case. I venture to deprecate the dealing with such cases in this way. The Act renders the making of a claim a condition of the maintenance of proceedings for recovery of compensation. This is inserted as a protection to the employer. It is a formality, no doubt, but the employer is entitled to have it complied with, and the Judge ought to deal with the question whether this has been done or not with the same seriousness and care as any other part of the case." But notwithstanding this, he was of opinion that the appeal should be dismissed.

LORD JUSTICE SCRUTTON'S VIEW.

That this was not the first occasion on which this Judge had incurred the censure of the Court of Appeal appears from the judgment of Lord Justice Scrutton, who, in giving his dissenting judgment, said: "We have had to note with regret this sittings a written judgment of this same County Court Judge in which he has stated that he is not bound to look at or be guided by any authorities at all. And I desire very respectfully but firmly to express my complete agreement with the rebuke, not the less pointed for the moderation with which it is expressed, addressed to him by Bankes, L.J., in *Burvill* v. *Vickers* (1916), 1 K.B. 180, at p. 188." In *Burvill* v. *Vickers* it appears that the same learned Judge in deciding a very similar point—namely as to whether employers had been prejudiced by the lack of notice, said: "To deprive the widow and the children of a man who has died serving his country by making munitions of war is unpatriotic, and it would be against public policy to allow it to be done." Lord Justice Bankes in that case said that: "It is time that the Judge's views as to his position as arbitrator under

the Act should receive consideration in the interests of the very person whom he is desirous of helping, because awards founded upon such reasons must necessarily lead to some extent and in some cases to the applicants being unable to support an award which has been given in their favour." It rather looks that in the interval between November 3, 1915 (when *Burvill* v. *Vickers* was decided), and December 15, 1916, the learned Judge had not had time to reconsider his opinion.

Recent War Legislation.

Nearly all the statutes now appearing if they do not relate directly to the war have been placed upon the book because of the war. On April 5, the Army Annual Act, 1917, received the Royal assent. This measure which has been used for generations to secure the annual assembly of Parliament has now assumed a form which would have startled us not a little three years ago. The preamble says: "And whereas it is adjudged necessary by His Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom and the defence of the possessions of His Majesty's Crown and that the whole number of such forces should consist of 5,000,000 including those employed at the depots in the United Kingdom of Great Britain and Ireland for the training of recruits for service at home and abroad but exclusive of the numbers actually serving within His Majesty's Indian possessions," and so forth. How long would the then Prime Minister have remained in office had he introduced this measure as a Bill, in April 1914?

Grand Juries Suspended.

The Grand Juries (Suspension) Act which received the Royal assent on March 28 is another remarkable Act. It makes an irresistible appeal to an English lawyer, affecting, as it does, one of the pillars of our legal institutions. Although it is expressed to remain in force during the continuance of the present war and for a period of six months thereafter, the general opinion is that the Grand Jury, as such, is a thing of the past. As was natural, the measure has been the subject of much criticism

in the press. For the benefit of Canadian readers a few words upon the origin and functions of this institution may not be out of place.

Origin of the Grand Jury.

Many laymen and some lawyers have a vague notion that the Grand Jury system was established by *Magna Charta*. In his work on the Great Charter, however, Mr. McKechnie says: "One persistent error, universally adopted for many centuries, and even now hard to dispel, is that the Great Charter granted or guaranteed trial by jury." The error has no doubt arisen from a misreading of ch. 40 which provides that: "No freeman shall be arrested, or detained in prison, or deprived of his freehold or outlawed or banished, or in any way molested, and we will not set forth against him nor send against him unless by the lawful judgment of his peers and by the law of the land." Of this celebrated pronouncement Creasy said, in his English Constitution (p. 151 n.): "The ultimate effect of this chapter was to give and to guarantee full protection for person and property to every human being that breathes English air."

The True Origin of the Grand Jury.

Mr. McKechnie in the work above mentioned writes: "It was . . . Henry II. who laid the foundation of the modern jury system . . . In reorganizing machinery for the suppression and punishment of crime by the Assizes of Clarendon and Northampton, he established the general principle that criminal trials should (in normal cases) begin with formal indictment of the accused by a representative body of neighbours sworn to speak the truth. This was merely a systematic enforcement of one of the many forms of *inquisition* already in use; from that date onwards the practice so established has been followed in England. Criminal prosecution cannot be begun on mere suspicion or irresponsible complaints. The jury of accusation (or presentment) may be said to have been instituted in 1166, and has continued in use ever since, passing by an unbroken course of development into the Grand Jury of the present day."

From 1166 down to the year of grace 1917 it has been a recognized principle unaffected even by statute, that no man shall even be put on his trial for any grave offence unless there is a *primâ facie* case against him. Of the question whether there is such a *primâ facie* case the Grand Jurors have been the sole judges. At each assize or Court of Quarter Sessions they have been summoned to attend to present indictments, and scarcely a Session goes by without one or more bills being ignored by the Grand Jury.

The exigencies of the war, however, have brought about a change. In future (to use the language of s. 1 (2) of the new Act):—

In any case where a person has been committed for trial, or where the consent or direction in writing of a Judge of the High Court or of the Attorney-General or Solicitor-General for the presentment of an indictment against any person has been given, but in no other case, an indictment against that person may be presented in the appropriate Court without having been found by a Grand Jury, but in other respects as heretofore.

. . .

It is thus that in a few lines of cold print an institution hallowed through the centuries has been swept away. It will be for a Judge of the High Court or one of the Law Officers of the Crown to exercise the function of the Grand Jury.

The Object Gained.

There can be no doubt that this reform will save an immense amount of time at assizes and other criminal Courts. The stately ceremony of charging the Grand Jury will no longer occupy the Judge's time; while the whilom Grand Juries who are generally busy men will not be called upon to waste the greater part of a day. The writer has heard but few objections to this reform. In time of peace the voice of controversy would have been uplifted. We should have read much of "a bulwark of British Liberty," of "a barrier between the Crown (represented by the Public Prosecutor) and the British Public." But the

noise of battle has hushed the critics who have one and all come to the conclusion that at any rate for the duration of the war the function of the Grand Jury may be safely entrusted to His Majesty's Judges and Law Officers.

W. VALENTINE BALL.

Temple, 28-4-1917.

DEFENCE OF THE REALM.

By a majority of four to one, the House of Lords have held, affirming the Court of Appeal and the Divisional Court, that reg. 14B made under the statutory powers of the Defence of the Realm is not *ultra vires*. This regulation provides for the internment of any person, in view of his hostile origin or associations, where it is necessary for securing public safety or defence of the realm, and it is quite clear that, taking the ordinary meaning of the words of the statute under which it was made, it was certainly *intra vires*. Under this power a naturalized British subject had been interned, and in the case in question (*Rex* v. *Halliday; Ex parte Zadig*) the old hackneyed arguments about the suspension of the writ of *habeas corpus* and the interference with the rights of British subjects were again put forward, we are glad to say, without success. As the Lord Chancellor pointed out, the measure was not punitive, but precautionary, and both statute and regulations were passed and made at a time of supreme national danger which still exists.

No reasonable-minded citizen will be impressed by the suggestion that regulations might be made involving the most extreme consequences, even the punishment of death, without trial. These regulations are made by His Majesty in Council, to whom the duty has been intrusted by Parliament, and there can be no grounds whatever for the suggestion that such powers will be exercised otherwise than reasonably. The regulation in question affords a good example, for the executive have provided an advisory committee, which includes two eminent Judges of the High Court, one from the Chancery and the other from the King's

Bench Division, and before whom the person suspected may appear, to assist the Secretary of State in arriving at a conclusion.

Before leaving this subject there is one other matter to which we must refer. Five Judges of the King's Bench, three Lords Justices, and the Lord Chancellor, Lord Dunedin, Lord Atkinson, and Lord Wrenbury have held the regulation *intra vires*. The sole dissenting Judge was Lord Shaw, and his judgment, which can only be characterised as an extraordinary tirade on the subject of what he calls British liberty, one can hardly believe was delivered by a member of the highest tribunal of the Empire. Two shore extracts—we quote from the *Times* report—are sufficient:—

"Under this the Government became a Committee of Public Safety. But its powers as such were far more arbitrary than those of the most famous Committee of Public Safety known to history."

And again:—

"The analogy was with a practice, more silent, more sinister —with the *lettres de cachet* of Louis Quatorze. No trial: proscription. The victim might be 'regulated'—not in his course of conduct or of action, not as to what he should do or avoid doing. He might be regulated to prison or to the scaffold."

Observations, certainly neither judicial nor accurate, and to which another description might well be well applied.—*Law Times.*

REPRISALS AND THEIR LIMITS.

There has been an interesting correspondence in the columns of the *Times* on the legitimacy of the recent air-raid reprisals at Freiburg. Amongst those who have taken part in it, in addition to Sir Edward Clarke, whose first letter we printed last week, are Professor Dicey, Professor Holland, Sir Herbert Stephen, and "Jurist." Several of these letters we print elsewhere. The general result of the correspondence is to base the opposition to such reprisals on grounds of morality and honour, and not upon any prohibition recognized by international law. In other words, they are immoral and dishonourable, though

they may be legal. The same higher tone is taken in a letter from Mr. Steed, which we print elsewhere, and on this we have nothing to add. But inasmuch as we said, in first criticising the occurrence, that such reprisals were forbidden by international law, we are naturally interested in Professor Holland's statement that they are not. "Objections," he writes, "might, of course, be made to them as unlikely to produce their hoped-for effect, or as repugnant to our feelings of humanity or honour. They are not illegal." Well, that depends on what we are entitled to treat as international law. The Hague Conventions are silent as to reprisals, and it may be admitted that there is no express authoritative declaration on the subject. That reprisals are, speaking generally, permissible is clear enough. Our Order in Council of March, 1915, for instance, by which the Blockade of Germany was set up, was stated to be by way of reprisal. But the objections to such procedure are so great that "belligerents are universally considered to be bound not to resort to reprisals except under the pressure of absolute necessity, and then not by way of revenge, but only in cases and to the extent by which an enemy may be deterred from a repetition of his offence:" Hall's International Law, 6th ed., p. 411. The question, indeed, is not as to the lawfulness of reprisals in general—that is, the meeting of one violation of the laws of war by another—but as to the limits which must be placed on them; and when we said that the air raid at Freiburg was forbidden by international law, we meant that it exceeded the limits which may now be regarded as recognized by international lawyers. These limits are founded on the gradual amelioration which has taken place—except with the Germans in the Franco-Prussian War and the present war—in the barbarities of war, and on the rule laid down by the Institute of International Law at Oxford, in 1881, that reprisals must in every case respect the laws of humanity and morality (*Annuaire de L'Institut de Droit International,* 5th year, p. 174). Air raids on undefended towns, which the aviators know will have as their natural—and therefore intended—result the deaths of women and children, exceed thes limits, and in that sense are unlawful.—*Solicitors' Journal.*

LAWYERS IN PUBLIC OFFICE.

In several recent instances the lay press has shewn satisfaction over an alleged modern tendency to prefer business men to lawyers for elective and appointive office, and predicted that more efficient administration of public affairs will result. The sponsors of this view apparently picture the typical lawyer as wholly engrossed in browbeating witnesses and drawing up documents full of involved verbiage. As a matter of fact the lawyer is the highest type of business expert. His most lucrative practice is found in solving by the aid of his broader viewpoint and better trained mind the problems which threaten his clients. The amount of business acumen necessary to advise the parties to a single corporate reorganization would suffice to run a grocery store for a year. Another element also is often lost sight of. A man engaged in commercial business is trained to the single idea of personal profit—a perfectly honourable and legitimate idea but none the less quite foreign to the highest ideals of public service. The lawyer, on the other hand, is trained to service; his most strenuous endeavours are habitually directed to maintain the rights and interests of another. A code of ethics rigidly enforced by the Courts teaches him that when his personal interest opposes that of his client he must act with an eye single to the benefit of the latter. Coming into public office it is a natural and easy transition of thought to regard the public as his client, and an application to the relation of officer and public of the fidelity and zeal which is habitual between the attorney and client would produce a public service well nigh ideal. It would be a public misfortune if the services of men trained in the legal profession were not utilized to the fullest possible extent by the public, but it is a misfortune which the discriminating electors of the country will assuredly avert notwithstanding the occasional descendants of Jack Cade who now edit newspapers.—*Law Notes.*

REVIEW OF CURRENT ENGLISH CASES.

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BANKER—DUTY TO ADVISE CUSTOMERS AS TO INVESTMENT—AUTHORITY OF BANK MANAGER—LIABILITY OF BANK—PAROL REPRESENTATION—STATUTE OF FRAUDS AMENDMENT ACT 1828 (9 GEO. IV. c. 14), s. 6—(R.S.O. c. 102, s. 8).

Banbury v. *Bank of Montreal* (1917) 1 K.B. 409. This was an action by the customer of a bank to recover damages for loss sustained by the plaintiff owing to his having relied on the advice of one of the defendant's managers in making certain investments. The facts of the case were that the plaintiff came from England to Canada in 1911 and stayed at Montreal with the general manager of the defendant bank, who gave him letters of introduction to branch managers and asking them to give plaintiff advice and assistance if he desired it. In 1912 he again visited Canada and went to Vernon, B.C., where he called upon the manager of the branch of the defendant bank at that place, upon whose advice he invested £25,000 upon a mortgage to secure a loan to a Canadian company, a customer and debtor of the bank. The advice alleged to have been given by the manager consisted of oral representations as to the credit of the company and the merits of the investment, and it was admitted that the advice was honestly given. The company failed to pay either principal or interest. It was admitted that the bank did not, and, according to the law of Canada, could not advise as to investments, and it was admitted that the branch manager had no general authority so to do. The action was tried by Darling, J., with a jury. The jury found that the branch manager had authority to advise the plaintiff as to his investment, and that he did advise him that the proposed investment would be a safe one; and that the plaintiff relied on the advice and invested his money, and they assessed the damages of the plaintiff at £25,000 for which amount Darling, J., gave judgment. The Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.), however, found that the findings of the jury were unwarranted by the evidence, and that the alleged representation, even if made, could not give rise to an action, not being in writing as required by 9 Geo. IV. c. 14, s. 6; (see R.S.O. c. 102, s. 8).

TRESSPASS—OCCUPIERS OF ADJOINING FARMS, HELD UNDER SAME LANDLORD—AGREEMENT WITH LANDLORD TO KEEP FENCES IN REPAIR—ANIMAL STRAYING FROM ADJOINING FARM ON TO LAND OF TENANT LIABLE TO LANDLORD TO KEEP UP FENCE—OWNER OF STRAYING ANIMAL—LIABILITY.

Holgate v. *Bleazard* (1917) 1 K.B. 443, was an action of trespass for injury to plaintiff's colt by an animal straying from the defendant's farm on to the plaintiff's land. The plaintiff and defendant were tenants of adjoining farms under the same landlord, and each had covenanted with the landlord to keep the fences on his farm in good repair. The plaintiff had neglected to keep his fence in repair, and an animal from the defendant's farm had strayed through the defective fence on to the plaintiff's land and injured his colt, and the question was whether, notwithstanding his neglect to keep his fence in repair, he was entitled to recover damages against the defendant. The Judge of the County Court who tried the action dismissed it, but a Divisional Court (Ridley, and Avory, JJ.), held that on the principle laid down in *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265; L.R. 3 H.L. 330, the defendant was liable, and that the plaintiff's neglect to keep his fence in repair was no defence. Their lordships held that there was a clear distinction between the case of a person bound by statute to keep a fence in repair, and that of a person whose obligation so to do rests on a covenant or agreement wth some third party.

POLICY OF INSURANCE — GOODS CONSIGNED ABROAD ON TERMS "SALE OR RETURN"—OUTBREAK OF WAR WITH COUNTRY OF CONSIGNEE—INABILITY OF CONSIGNEE TO DEAL WITH GOODS—LOSS UNDER POLICY.

Moore v. *Evans* (1917) 1 K.B. 458. This was an appeal from the judgment of Rowlatt, J. (1916) 1 K.B. 479 (noted ante vol. 52, p. 217). The action was brought on an insurance policy on goods as for a total loss. The goods in question had, before the war, been consigned to a person in Germany on terms of sale or return. The goods were insured against any loss whatever. In the ordinary course of business, goods consigned on the above terms remain with the consignee for a limited period to give him an opportunity of selling them. By reason of the outbreak of the war it became impossible for the plaintiff to recover possession of the goods. There was no evidence that

they had been seized, or specifically interfered with by the German authorities, or that they had not remained in the possession of the consignees. Part of them had been placed by the consignees, with the consent of the plaintiff, in the custody of a bank for safe keeping, and there was no evidence that the remainder were not still in the possession of the consignees. The Court of Appeal (Eady, and Bankes, L.JJ.), held that the policy was on goods, and not on an adventure, and that the evidence did not establish a loss under the policy, and the judgment of Rowlatt, J., was therefore reversed.

PRINCIPAL AND AGENT—REMUNERATION—COMMISSION ON NET ANNUAL PROFITS—EXCESS PROFITS DUTY.

Thomas v. *Hamlyn* (1917) 1 K.B. 527. This was an action by the plaintiff as manager of defendant's business to recover his remuneration therefor, which it was agreed should be fifteen per cent. of the net annual profits thereof, and the sole question at issue was whether in estimating such profits the defendants were entitled first to deduct from the profits the excess profits tax imposed by statute. Rowlatt, J., who tried the action, held that the defendants were not entitled to make the deduction claimed.

PRINCIPAL AND AGENT—DAMAGE OCCASIONED BY UNTRUE STATEMENT OF AGENT TO PRINCIPAL—MEASURE OF DAMAGES.

Johnston v. *Braham* (1917) 1 K.B. 586. This was an appeal from the judgment of a Divisional Court (1916) 2 K.B. 529 (noted ante vol. 52, p. 432). The action was brought by a principal against her agent for damages occasioned by the plaintiff being induced to enter into a contract with third parties by the false representations of the agent. The Court of Appeal (Eady, Bankes, and Scrutton, L.JJ.), held that there was evidence on which the Judge at the trial could properly award the plaintiff the sum of £20 for her loss of time in addition to the actual outlay incurred by her, and dismissed the appeal.

MASTER AND SERVANT—RAILWAY COMPANY—LIABILITY FOR ACTS OF SERVANT—IMPLIED AUTHORITY—SLANDER — ARREST OF PASSENGER.

Ormiston v. *Great Western Ry.* (1917) 1 K.B. 598. The plaintiff was the holder of a first-class season ticket entitling

him to travel between certain stations on the defendant's railway. Upon the plaintiff's arrival at a station for which his ticket was available, after he had passed the ticket barrier and shewn his ticket to a ticket collector, but before he had reached the exit from the station, a porter in the defendant's employment took him by the arm and, in the presence of other persons, accused him of travelling first-class on a third-class ticket. The plaintiff brought the action for slander and assault and false imprisonment. The action was tried by Rowlatt, J., and was dismissed on the grounds that the offence of travelling without a proper ticket not being punishable by imprisonment, the claim for slander could not be maintained, no special damage being shewn; and further, that as the defendants had no power to arrest the plaintiff for the offence with which he was charged by the porter, they could not be taken to have impliedly authorized the porter to arrest him. The action therefore failed.

LANDLORD AND TENANT—LEASE—COVENANT BY LESSEE TO REPAIR BEING ALLOWED ALL NECESSARY MATERIALS THEREFOR—CONSTRUCTION.

Westacott v. *Hahn* (1917) 1 K.B. 605. In this case the construction of a covenant by a lessee to repair was in question. The covenant was somewhat unusual in its terms, providing, that the lessee would "from time to time during the said term at his own cost (being allowed all necessary materials for this purpose (to be previously approved in writing by the lessor) and carting such material free of cost a distance not exceeding five miles from the farm) when, and so often as, need shall require, well and substantially repair and maintain the farmhouses, etc., to the said premises belonging." The question discussed was whether the stipulation as to the allowance of all necessary materials raised an implied covenant on the part of the lessor to furnish them. The lessor had made no demand for the making of the repairs required, and it was held by the Divisional Court (Lord Reading, C.J., and Ridley, and Coleridge, JJ.), that the words in question did not create any implied covenant on the part of the lessor to supply the materials, but merely had the effect of making the lessee's covenant conditional on their being supplied.

HIRE-PURCHASE AGREEMENT — CONTRACT BY HIRER TO KEEP HIRED CHATTEL IN REPAIR—CHATTEL SENT TO REPAIRER—LIEN OF REPAIRER ON CHATTEL AS AGAINST OWNER FOR COST OF REPAIRS.

Green v. *All Motors* (1917) 1 K.B. 625. In this case the plaintiff let a motor car to a person on a hire-purchase agreement, the hirer agreeing to keep the car in repair. The car needed repair and was sent by the hirer to the defendants for repair. After the car was sent to the defendants for repair and before the contract for repairs was made, default was made in the payment of an instalment under the hire-purchase agreement. The plaintiff did not terminate the agreement until after the repairs were commenced, when he demanded the car from the defendants, but did not tender the amount then due for the cost of the repairs. The defendants refused to deliver up the car, and subsequently completed the repairs, for the cost of which they claimed a lien on the car as against the plaintiff who brought the action to recover possession. Lush, J., who tried the action held that, in the circumstances, the defendants were entitled to the lien claimed, and his judgment was affirmed by the Court of Appeal (Eady, Bankes, and Scrutton, L.JJ.).

HUSBAND AND WIFE—MIXED MARRIAGE—ENGLISH MARRIAGE OF MAHOMEDAN DOMICILED IN INDIA WITH CHRISTIAN WOMAN—DISSOLUTION OF MARRIAGE—"WRITING OF DIVORCEMENT."

The King v. *Superintendent Registrar, Etc.* (1917) 1 K.B. 634. This was an application for a mandamus to the registrar of marriages to compel him to issue a marriage license to the applicant. It appeared that the applicant, a Mahomedan domiciled in India, had in March, 1913, married a Christian woman in England, she had in 1913 deserted him, and had since refused to live with him. He had instituted proceedings in India and obtained a decree for the restitution of conjugal rights, which she refused to obey, and she had subsequently instituted proceedings in England for a divorce on the ground of cruelty, which proceedings were dismissed for want of prosecution. The applicant thereupon assumed to divorce his wife according to the rites of the Mahomedan religion, which divorce he claimed was effectual and entitled him to marry again in England. In order to ascertain his position the applicant had instituted proceedings in the Probate and Divorce Division for a decree declaring

his marriage had been dissolved, and alternatively for a dissolution of the marriage on the ground of the alleged misconduct of his wife. The suit had been dismissed on the ground that the applicant was not domiciled in England; but Deane, J., intimated that he considered the marriage had been dissolved, and there being no subsisting marriage the Court could not pronounce the decree asked. The applicant then applied to the registrar for a marriage license which was refused. The Divisional Court (Lord Reading, C.J., and Darling, and Bray, JJ.), dismissed the application, holding that there had been no legal dissolution of the marriage of 1913, and that though the wife was suubject to the law of her husband's domicile, she was not subject to the law of his religion, and therefore the pretended divorce was inoperative, and with this conclusion the Court of Appeal (Eady, and Bankes, L.JJ., and Lawrence, J.), agreed. Their lordships point out that although according to Mahomedan law the applicant might dissolve a Mahomedan marriage, there was nothing to shew that by that law he could dissolve a Christian marriage.

ADMINISTRATION DE BONIS NON—WILL—CONSTRUCTION.

Re Griffiths, Morgan v. *Stephens* (1917) P. 59. This was an application for the grant of letters of administration *de bonis non* of the estate of William Griffiths, in the following circumstances. The testator by his will gave all his property to his wife "during her widowhood" and after her death to the child or children, "Issue of our marriage." Should the widow marry the property was to devolve on "the offspring of our marriage:" and if the issue of the marriage should die, then, on the remarriage of the wife, the testator directed the property was to go over to "the legal next of kin and heirs descendants of my family." There was no appointment of an executor. The widow did not marry again. There was only one child of the marriage, and he predeceased the widow. The widow died in 1915 leaving a will which was proved by the executrices named therein —who also took out letters of administration to the estate of the deceased child of the testator, and they now opposed the application of one of the next of kin of William Griffiths for letters of administration *de bonis non* of his estate. Low, J., held that the child of the testator did not take a vested interest, but only an interest contingent on his surviving the remarriage or death

of his mother, and therefore the applicant was entitled to the grant in preference to the representatives of the deceased child and widow.

MERGER — INTENTION — EVIDENCE — SUBSEQUENT DEALINGS WITH PROPERTY.

In re Fletcher, Reading v. *Fletcher* (1917) 1 Ch. 339. This was an appeal from the decision of Astbury, J. (1917), 1 Ch. 147 (noted ante p. 182), and the Court of Appeal (Lord Cozens-Hardy, M.R., Warrington, L.J., and Lawrence, J.), have reversed his decision. The case really turns on a point of evidence, the Court below being of the opinion that evidence of an intention against merger must be concurrent with the transaction which would operate as a merger but for such opposite intention, therefore that a subsequent dealing with the property on the basis of there being no merger, was not sufficient to prevent a merger. The Court of Appeal on the other hand held that the intention not to create a merger may be established by the subsequent dealings with the property. In this case it may be remembered that a leasehold term, and the reversion, became vested in the same person, and nine months subsequently the term was assigned by the transferee as a still subsisting term, and it was held that this was sufficient evidence of the intention not to create a merger.

VENDOR AND PURCHASER—OPEN CONTRACT TO PURCHASE LAND—SPECIFIC PERFORMANCE—INQUIRY AS TO TITLE—NOTICE TO PURCHASER OF INCURABLE DEFECTS PRIOR TO CONTRACT—EVIDENCE.

Alderdale Estate Co. v. *McGrory* (1917) 1 Ch. 414. This was an action for specific performance, in which judgment had been pronounced for specific performance in case a good title could be made by the plaintiffs, and a reference as to title was directed. On the reference the defendant objected (1) that there was a public right of way across the land; (2) that there was a public sewer under it, and (3) that the vendors had no title to the subjacent minerals. The plaintiffs offered evidence to prove that the defendant, prior to the contract, had actual knowledge of all these defects. The Vice-Chancellor of Lancaster held that such evidence was inadmissible, but the Court of Appeal (Lord Cozens-Hardy, M.R., Warrington, L.J., and Lawrence, J.), held that it was.

WILL—ADMINISTRATION — ANNUITY CHARGED ON REAL AND PERSONAL ESTATE—EXPRESS TRUST — ARREARS OF ANNUITY—ACKNOWLEDGMENT IN WRITING—REAL PROPERTY LIMITATION ACT, 1833 (3-4 WM. IV. C. 27), SS. 1, 25, 40, 42—REAL PROPERTY LIMITATION ACT 1874 (37-38 VICT. C. 57), SS. 8, 10—(R.S.O. C. 75, SS. 18, 24, 25, 47 (2) (*b*).

In re Turner, Klaftenberger v. *Groombridge* (1917) 1 Ch. 422. This was an action to recover arrears of annuity charged by a will on the real and personal estate of the testator. The plaintiff claimed to recover the whole amount due, which exceeded six years' arrears, on the ground that it was payable by the defendants as trustees under an express trust, but Neville, J., held that, under the Statutes of Limitations, no more than six years' arrears were recoverable either as against the real or personal estate.

ONTARIO — SEPARATE SCHOOLS—ENGLISH—FRENCH SCHOOLS—RESTRICTION OF USE OF FRENCH—B.N.A. ACT, 1867 (30-31 VICT. C. 3) S. 93 (1)—PROVINCIAL LEGISLATURE.

Trustees of R.C. Separate Schools v. *Mackell* (1917) A.C. 62. The question at issue in this case was whether the Provincial Legislature of Ontario had power under the B.N.A. Act, 1867, s. 93 (1), to restrict the use of French as a language of instruction in Roman Catholic Separate Schools. The Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw, and Parmoor) held that it had, and the validity of Regulation 17 was upheld.

ONTARIO — SEPARATE SCHOOLS—TRUSTEES—ACT SUPERSEDING TRUSTEES—INVALIDITY—5 GEO. V., C. 45, ONT.—B.N.A. ACT, 1867, S. 93 (1).

Trustees of R.C. Separate Schools v. *Ottawa* (1917) A.C. 76. The question in this case was whether the Provincial Legislature of Ontario had power under the B.N.A. Act, s. 93 (1), to pass a statute (5 Geo. V., c. 45 Ont.) purporting to supersede the school trustees of Roman Catholic Schools who refused to carry out a regulation of the Department of Education restricting the use of French as a language of instruction in such schools. The validity of the regulation was in litigation, and there being no reason to believe that, when determined, as it was in the preceding case, the decision would not be accepted and obeyed, and it

appearing that the Act in question was too wide in its scope, in that it purported to enable the Government of the Province permanently to withdraw from the trustees power to control the schools under their care, the Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw, and Parmoor) declared the Act in question to be *ultra vires*.

These two cases are palmary instances of the value of the appeal to His Majesty in Council, where questions of this kind, involving a good deal of feeling, can be adjudicated in the calm atmosphere of a Court absolutely free from all local prejudices and prepossessions.

Their lordships absolutely disclaim the idea that the trustees cannot, by due process of law, be compelled to discharge their duties according to law.

ONTARIO—TORONTO ELECTRIC LIGHT CO.—MUNICIPALITY OF TORONTO—LETTERS PATENT—RIGHT TO ERECT POLES—FRANCHISE—45 VICT. c. 19, s. 2 ONT.

Toronto Electric Light Co. v. *Toronto* (1917) A.C. 84. The appellant company was incorporated by letters patent issued under R.S.O. 1877, c. 150, and 45 Vict. c. 19 (Ont.). It was empowered to conduct electricity by any means through, under, or along, the streets of the municipalities named in the patent, but only upon, and subject to, such agreement in respect thereof as should be made between the company and the municipalities respectively. The company erected poles in the streets of the city of Toronto for the purpose of their business, which had been suffered to remain without objection by the city for sometime, but which the city had recently ordered the company to remove, and in default had proceeded to remove some of the poles. The action was brought to restrain the city from so doing. Middleton, J., granted an injunction as prayed, and his decision was reversed by the Appellate Division, 33 O.L.R. 267. The Judicial Committee of the Privy Council (Lords Haldane, Atkinson, Shaw, and Parmoor) now affirm judgment of the Appellate Division, holding, that mere acquiescence on the part of the city was not sufficient to satisfy the requirements of the statute, which required a formal agreement to be made; and secondly, that the city had an absolute right to prohibit the company from constructing any works through, under, or along the streets of the city, and not merely a right to regulate by agreement the manner in which the work should be carried out.

Reports and Notes of Cases.

Province of Saskatchewan.

SUPREME COURT.

ANDERSON v. CANADIAN NORTHERN R. Co.

Elwood, J.] [33 D.L.R. 418.

Railways — Injury to animals at large — Owner's negligence— Wilful act or omission.

It is a wilful act within the meaning of sec. 294(1) of the Railway Act, 1906, to turn animals at large upon a highway within half a mile of an intersection at rail level despite a provincial Act permitting animals to run at large, and if the animals so at large get from the highway to railway property and are killed or injured there, the railway company is not liable.

[*Koch* v. *G.T.P. Branch Lines* (Sask. 1917), 32 D.L.R. 393 (annotated) considered; see also annotation following.]

G. E. Taylor, K.C., for plaintiffs. *J. N. Fish*, K.C., for defendant.

ANNOTATION ON ABOVE CASE IN D.L.R.

ANIMALS STRAYING ON RAILWAY.

In the above case the animals were turned out by the owner, to graze with other stock, where they would, upon unenclosed land; they got upon a highway, and thence upon the railway, at an intersection at rail level, where the cattle guards had been removed.

A provincial Act says that "it shall be lawful to allow animals to run at large." The only question of law really raised by these facts is this, is the intentional act of the owner in turning his cattle at large a "wilful" act, within the meaning of sec. 294(4) of the Railway Act, R.S.C. 1906, in view of the fact that it is legalized by the provincial Act, so far as such an Act can legalize it? Elwood, J., said: "The mere fact that there is a (provincial) statute permitting them to be at large cannot affect the owner's position and responsibility with respect to the railway company. It (the owner's act) is none the less intentional (that is, wilful) that it is permitted.

Elwood, J., seemed to see some significance in the word "permitted" where it occurs in sec. 294(1) "No horse, etc., shall be permitted to be at large." In face of that word he thought a provincial Act could not grant permission,

but manifestly, provincial power, if it existed under the B.N.A. Act 1867, could not be limited by any such prohibition. "Permitted" is mere surplusage in sec. 294(1) which should be read as if it ran: No horse, etc., shall be at large.

The offence is not in permitting, but in being at large; it is not the owner who is at fault, by permitting, but the animal in being at large.

In arriving at this conclusion, Elwood, J., considered himself at liberty to disregard certain opinions upon this point expressed by the Saskatchewan Court of Appeal in *Early* v. *C.N.R. Co.*, 21 D.L.R. 413, and *Koch* v. *G.T.P. Branch Lines Co.*, 32 D.L.R. 393, upon the ground that those opinions were not necessary to the findings in the cases, and, therefore, were *obiter*. It is true that in the *Koch* case it was found as a fact that the owner had not been guilty of negligence, and therefore was entitled to damages, but it is also true that a by-law permitting animals to be at large was proven, and relied on, and that the Court based its judgment on this point as well as on the other. The opinion, therefore, cannot properly be considered as *obiter*, and the decision of Elwood, J., must be attributed to the very strong conviction he evidently felt that the Court of Appeal was wrong. Those who have read the annotation in 32 D.L.R., at p. 397, will notice that this is the opinion there expressed.

The remarks made by Elwood, J., himself in relation to injuries to animals which get upon a railway through a defective railway fence are clearly *obiter*, as the point was not in issue before him. They are based upon what appears to us a misapprehension of a remark made by Boyd, C., in *McLeod* v. *C.N.R. Co.*, 18 O.L.R., at 624, and are apparently intended to suggest a ground upon which *Greenlaw* v. *C.N.R. Co.*, 12 D.L.R. 402, could have been decided, but was not; a suggestion made, apparently, in order that the grounds given by the Manitoba Court of Appeal for its decision might also be treated by Elwood, J., as *obiter*, because he did not agree with them. In that case, the animals which were running at large got upon the railway from unenclosed lands, not by using a highway, but through a defective railway fence; but a municipal by-law permitted cattle to run at large, and the Manitoba Court held that because of the by-law the intentional act of the owner in turning his cattle at large was not "wilful," within the meaning of the Railway Act. Elwood, J., now comments that these animals were not "at large" within the meaning of sec. 294(4), and this rather amazing conclusion he deduces from the remark made by Boyd, C., that "cattle on the lands of the owners are not at large, but at home." So also, says Elwood, J., are cattle of other persons permitted by an owner to be on his land, or cattle there "by virtue of a statute or municipal by-law." In passing, it may be remarked that while it is possible that the rights of an owner of land against an adjoining railway may be attributed to the owner's licensee, it is difficult to conceive how they could be attributed to a trespasser who had no other defence than that a municipal by-law said that his cattle might run at large. It may also be pointed out that if the cattle in *Greenlaw* case were not "at large" within the meaning of sec. 294(4), their owner had no remedy under that section, and as the land was unenclosed, the railway was not bound to fence it (sec. 254), so that the railway would not be liable under sec. 427. The Manitoba Court saw this difficulty, and avoided it by finding that the municipal by-law had the effect of making an intentional

action of the owner neither negligent nor wilful. The plaintiff was given damages under sec. 294(4), which could not have been done if the animals were not "at large."

But a perusal of *McLeod* v. *C.N.R. Co.* (*supra*), will shew that the remark of Boyd, C., has been torn from its setting, and does not, in fact, warrant the deductions Elwood, J., has drawn from it. In that case the animals had got upon the railway from an enclosed field, through a gap in the railway fence, and all that Boyd, C., meant was this, "animals on the (enclosed) lands of the owner are not at large, and therefore sec. 294 does not apply." The defendant company was found liable because it had not kept in good repair the fence it was bound to keep up between the enclosed land and the railway track. In other words, *McLeod* v. *C.N.R. Co.* was decided on the meaning of the words "at large," the *Greenlaw* case on the meaning of the words "negligence or wilful act or omission."

To say of unenclosed land that the owner whose cattle got from it to the railway could recover for injury to them if they got there "through a defect in the railway fence" is to leave out of sight the fact that unless the land is both enclosed and settled or improved (sec. 254(4)), the company is not bound to fence, and consequently is not liable under sec. 427(2).

"At large," in the Railway Act, manifestly means "not enclosed or under physical restraint," for sec. 294(1) speaks of animals at large upon a highway in charge of a competent person, shewing that the mere fact of a caretaker being with them, while a defence, does not alter the fact that they are at large. Sub-sec. 4 speaks of animals at large, whether upon the highway or not, and as the words "at large" should be given the same meaning in all parts of the section, they can only mean in sub-sec. 4, as in sub-sec. 2, "Animals not enclosed or under physical restraint." Sec. 254 provides that the railway company shall fence where the track runs through fenced land which is settled or improved, and sec. 427 renders the company liable in damages resulting from failure to so fence. For injury to animals not at large, sec. 294 provides no remedy; that is to say, for animals under physical restraint, or upon enclosed land, which not being either improved or settled, the company was not bound to fence, and mere inclosure is not improvement within the meaning of sec. 254. For damages to such animals, an action for negligence on common law grounds would probably lie; for animals at large, sec. 294 is a code, and sub-sec. 4 makes the company liable without proof of negligence on its part, for animals killed on its property, but allows it to be a good defence that the animals got at large through the negligence or wilful act of the owner. Thus the Railway Act is seen to have three principles as to animals: (1) If not at large, liability is dependent upon negligence; (2) If at large upon a highway, without competent oversight, the company is not liable; if with such oversight, liability as in the former case is a question of negligence; (3) If at large anywhere, and injured upon railway property, the company is liable unless it can prove that the animals got at large by the negligence or wilful act of the owner. At large or not at large is a question of fact, and negligence or wilful act or omission are also questions of fact. If the law is not satisfactory, parliament, not the Courts, should do the necessary legislation.

Bench and Bar

CANADIAN BAR ASSOCIATION.

ANNUAL MEETING.

The third annual meeting of this Association will be held in the City of Winnipeg on the 29th, 30th, and 31st days of August next. The Executive are making arrangements to facilitate transportation, preparing of programme of proceedings, etc. The annual address will be delivered by the Hon. Hampton L. Carson of Philadelphia. Other leaders of the Bar from the United States will also be present.

Committees are also working on the following important subjects: Judicial appointments: Judges as arbitrators and commissioners: Uniform legal procedure: Marriage and divorce: Agency commissions: Delays in the administration of justice and in the publication of statutes: Uniform statutes are in course of preparation for company law, insurance, conditional sales, bulk sales and the enforcement of foreign judgments, while succession duties and insolvency are also receiving attention. As upholding the honour and dignity of the profession, legal education and professional ethics are also under consideration.

Whilst we are glad to know that the Association is dealing with these matters in view of amendments, we would again seek to emphasize the crying need there is for making an advance in the direction indicated by section 94 of the British North America Act; and as far as possible to include the Province of Quebec. There should be complete and absolute uniformity in the subjects above referred to as also in the law affecting devolution of estates and intestacy: Limitation of actions: Assignments and preferences and other branches of mercantile law. If Canada is ever to be a homogeneous nation, uniformity of laws and procedure must exist. The tendency at present is for the various Provinces to drift apart in this regard rather than to get together. This is all wrong, and none can be more helpful in discussing this most difficult subject than the legal profession. Those who look for a full development of the resources of this country and the requirements of the trade and business of the Dominion along national lines are beginning to think seriously of this matter. The time of action is not appropriate at this moment, but it must come in due course, and the sooner the better.

The *Canada Gazette* of June 16th announces that the Hon. Sir Ezekiel McLeod, Chief Justice of the Supreme Court of New Brunswick, and the Hon. Louis Tellier, a retired Judge of the Superior Court of the Province of Quebec, have been appointed Commissioners to review, consider and report upon the evidence taken before the Hon. Mr. Justice Galt, of Manitoba, a Commissioner appointed by the Lieutenant-Governor of Manitoba to investigate and report upon certain matters of concern to the Government of Manitoba. It is much to be regretted that it is thought to be necessary to use our judges to investigate and report on matters which are connected with alleged scandals in which party politics figure largely. It is degrading to the Bench and not satisfying so far as the public is concerned and never will be. Let judges attend to their proper duties and let politicians settle their squabbles without dragging in the Bench.

Flotsam and Jetsam.

A triumph of commercialism over sentiment was exhibited in the United States in the case of *Pollock* v. *Symon*, Fed. 1005. A swain became engaged to a young lady and presented her with an engagement ring of considerable value, and shortly afterwards went into bankruptcy. It was held that, notwithstanding the custom of betrothed persons in regard to such matters, a man must be just before he is generous, and cannot be generous with money which really belongs to his creditors, even for the purpose of retaining the affection of his lady-love. The ring being, therefore, part of the bankrupt's estate, the lady was told that if she desired to retain it she would have to pay its value to her lover's creditors.

It may be interesting to some members of the profession to know that the total amount of fees paid to counsel on the celebrated prosecution of the seven bishops was only £240 16s. 0d., and that the largest fee paid to any counsel on that occasion was £20. What would the present generation of lawyers think of such fees in such a case?

Canada Law Journal.

VOL. LIII. TORONTO, JULY, 1917. No. 7

CONFEDERATION DAY

JULY 1, 1857–1917.

For heathen heart that puts her trust
In reeking tube and iron shard;
All valiant dust that builds on dust,
And guarding calls not Thee to guard:
For frantic boast and foolish word,
Thy mercy on Thy people, Lord.—*Amen.*

—KIPLING.

HONOUR TO WHOM HONOUR.

The *Canadian Gazette*, of July 14, contains the following announcement:—"His Majesty the King has been pleased to approve of the retention of the title of 'Honourable' by Mr. Featherston Osler, a retired Judge of the Appellate Division of the Supreme Court of Ontario." This announcement is, we presume, an official declaration that judges retiring from our Superior Courts do not carry into private life the title "Honourable".

There is one person to whom this announcement will be of little interest, and that is Mr. Osler himself. It adds nothing to the esteem and respect in which the profession and the public hold one of the best and most learned judges that ever graced the Bench of Ontario, and whose personal worth and high character are known to all. It was a subject of comment that Mr. Justice Osler was not one of our Chief Justices, in which case

knighthood would have been a matter of merit as well as of routine.

The lavish bestowal of honours in these days destroys their value, even to those who might be entitled to some public worth of distinction. Colonels are becoming as common in Canada to day as they were said to have been in the United States when Dickens wrote "Martin Chuzzlewit."* Knights Bachelor are now as common as Colonels. Occasionally some one is made a Baronet or even a Lord. The public were prepared to stand the latter when Strathcona, that great friend of Canada, went to live in England, but it might well have stopped with him. Again, no title could have been too great a distinction for Chief Justice Sir John Beverley Robinson and no one objected to his being made a Baronet, but a recent bestowal of that title on some one else has been the subject of some adverse criticism.

If it is necessary to give some one worthy of it a public mark of distinction as having performed signal service for Canada, to those holding big positions, governmental or official, the appellation of "Sir" is as good as anything else. But to dub a civilian "Colonel" is an absurdity, and an insult to the army. It would be quite as appropriate to honour him with the title of "Archdeacon" or "Canon" or "Doctor" or "Professor" or "Admiral" or anything else. It was a funny sight once to see one of these Colonels, a fat lubberly civilian, who did not know the goose step from "extension motions," and badly in need of "setting-up" drill, strutting about in uniform; fortunately for him it was not in regulations to wear a sword or an accident might have happened.

The truth is that these titles are not suited to the climate of Canada. They are exotics, and, as the country does not supply hot houses for them, they will in the course of time probably die out. Titles that die with a person are not so objectionable as those

* "Pursuing his enquiries Martin found that there were no less than four Majors present, two Colonels, one General and a Captain, so that he could not help thinking how strongly officered the American Militia must be, and wondering very much whether the officers commanded each other, or if they did not, where on earth the privates came from; there seemed to be no man here without a title."

which are hereditary, such as Baron or Baronet, where the title descends to the son or other male heir of the recipient of the honour. There are many reasons why objections that prevail here are less so in the Motherland. It is obvious that in cases where a son who succeeds to a title may be a misfit, or unworthy, or for some reason be unable to uphold properly the dignity of the title becomes a joke.

TRADING WITH THE ENEMY.

The English Court of Appeal (Lord Cozens-Hardy, M.R. Eady, Bankes, Warrington, and Bray, and Scrutton, L.J., dissenting), have recently come to a decision which appears to us somewhat puzzling, and the grounds stated in the *Law Times Journal's* note of the case do not appear to be particularly convincing. The case we refer to is *Tingley* v. *Miller*, 143 L.T. Jour. 38. The facts appearing by the note were as follows: The defendant was formerly a German resident in England. He was required by the British Government to leave England, and on the 20th day of May, 1915, prior to his departure, he executed a power of attorney whereby he appointed an attorney to sell his house in England. On 26th May, 1915, he left England for Flushing, en route for Germany. On 2nd June, 1915, the attorney offered the house for sale by auction and the plaintiff became the purchaser without notice of the above-mentioned facts. The defendant reached Germany between the 26th May and 11th June, 1915, but there was no evidence as to the exact date of his arrival there. The plaintiff had entered into possession. The action was brought to have the contract declared null and void as being a trading with the enemy, contrary to the common law and the Royal Proclamation of 19th September, 1914. Eve, J., dismissed the action on the ground that he could not infer that defendant had reached Germany by 2nd June, and the plaintiff appealed from his decision. The Court of Appeal held that the defendant must be presumed to have reached Germany by 2nd June, but that great weight must be given to the power of attorney of the 20th May,

when the defendant was not an alien enemy, which, it was said, was "irrevocable" and rendered further "intercourse" with the defendant unnecessary—and it is said the position was practically as if the defendant had conveyed the property in trust for sale. Such a transaction it is affirmed is not a trading with the enemy within the meaning of the common law, or the Proclamation, and it is said the power of attorney was not necessarily revoked when the defendant became an alien enemy. But unless it was the fact that the donee of the power was also the person beneficially interested in the proceeds of the sale, or a trustee thereof for persons other than the defendant, who were not alien enemies, it is very difficult to understand how the decision could have been reached. It would seem as if some part of the proceeds of the sale, at all events, was payable to the defendant, because he was willing that any such moneys should be payable to the Public Trustee as custodian.

If the defendant really retained any beneficial interest in the property, the question naturally arises how could he by his attorney enter into a contract with the plaintiff, which he could not himself have entered into, in his own person? The question before the Court appears really to have been this, could the defendant himself, at the time the contract was made, have made the contract with the plaintiff. On the facts found by the Court of Appeal, he was on that date an alien enemy, and therefore incapable of making the contract; but the Court of Appeal have in effect said—though he could not himself have made the contract he could validly do so by his attorney, which it is hard to understand unless the fact be that the defendant after the giving of the power ceased to have any beneficial interest or became a mere *cestui que trust* with others in the proceeds of the sale.

Probably a fuller report may disclose facts and circumstances throwing a somewhat different complexion on the case; at any rate we think it would be quite unsafe to infer from this decision that an alien enemy may in ordinary circumstances make valid contracts through an attorney.

ONTARIO STATUTES FOR 1917.

The volume of Statutes of the Legislature for Ontario have been issued with commendable promptitude. The Government is to be congratulated, not only on that fact, but also on the improvement in the general "get up" of the last two volumes.

There does not appear to have been any legislation of very striking importance during the last session. The Ontario Temperance Act has received considerable amendments chiefly in matters of detail. As also the Workmen's Compensation Act We see that an Act has been passed to regulate the purchase, sale and transfer of goods in bulk (chapter 33). The principal object of the Act appears to be to protect the creditors of the vendor, and to prevent the apparent owner of a stock in trade from selling it in bulk, and pocketing the proceeds, to the prejudice of those to whom he may be indebted. The purchaser in any such transaction is now required before concluding his bargain to obtain from the vendor a statutory declaration as to the names and amounts due to his various creditors, otherwise the transaction will be void as against such creditors. On obtaining such declaration the vendor is to lodge the purchase-money in the hands of a trustee for distribution among creditors unless the latter choose to waive that course.

We have noticed a few slight defects which it may be well to note: c. 4, s. 4 amends sub-section 9, the sub-section intended to be amended would appear to be sub-section 10.

C. 20, s. 15, purports to amend s-s. 5 of s. 10. The section intended to be amended is s-s. 5, of s. 37, as enacted by s. 10.

C. 23, s. 8, repeals sections "2 to 7." Does this include 7? It substitutes ss. "2 to 7" of c. 23. Does this include s. 7? The addition of the word "inclusive" would have prevented any question.

C. 27 amends the Succession Duty Act. This chapter might well have also amended the clerical errors in 5 Geo. V. c. 7, s. 4 (3), where the section purported to be amended is s. 8, whereas s. 7 appears to have been the section really intended.

We notice that 6 Geo. V. c. 24, appears in the Statute book

without the usual preliminary enacting clause; this strange omission is now supplied by c. 29 of the recent session.

C. 29, by naming certain new schedules "A" and "B," seems to create an opportunity for confusion, as in the principal Act there are already schedules with the like designations.

We have, on former occasions, pointed out the desirability of arranging all amending statutes in orderly sequence. This method as a rule has been generally observed in the present volume; there are, however, a few instances where it has been departed from, *e.g.*, in c. 34, s. 4 amends s. 12, and s. 5 amends s. 6, of the same Act. In c. 42, s. 12 (1) should have been numbered s. 14,—cc. 56, 57 are both out of order and might, we think, have more appropriately followed c. 48.

NOTES FROM THE ENGLISH INNS OF COURT.

The Inns Themselves.

Many Canadian lawyers are now in England—not, indeed, on legal business, but on their way to, or on furlough from the front. If they have a few hours to spare in London they may seek out the wells of English law. To them a few notes about the Inns of Court may be of interest. Baedeker, it may be supposed, will tell them something; but perhaps he has little knowledge *le plus intimé*.

The only Inns that retain the right to call men to the Bar are the Inner Temple, the Middle Temple, Lincoln's Inn and Grays Inn. Other Inns there are such as Clements Inn and Furnivals Inn; but as corporate bodies they have long since passed away although their names and in some cases the original buildings still survive. Of the Inns of Court a wag once wrote:

The Inner for a rich man,
The Middle for a poor,
Lincolns for a parchmenter
And Grays Inn for a bore.

It is possible that some kindly commentator has changed the word 'boor' into 'bore' in the last line, but the line is no longer true in any sense. Your Grays Inn man is one of the best.

Lincolns Inn.

As a member of this Inn—although not a "parchmenter"—the writer knows rather more about it. It is situated on the north side of the Law Courts and to the east of Lincolns Inn Fields—a large open space—formerly the property of the Inn which was sold to the London County Council for the sum of £12,000. The Fields are now a public recreation ground. It is not to be supposed that all the numerous sets of chambers which are included in Lincolns Inn are the property of the Benchers. The freehold of some of them is in other people. *Mirabile dictu*, in this seminary of real property lawyers, there are some chambers in freehold tenure on the second or third floor of the buildings. Nice legal questions may one day arise when the buildings fall down, in the process of decay, as to the rights of the owners of the different floors.

Possibly the most interesting edifice in the Inn is the Old Hall which, until the building of the Royal Courts of Justice, was used as a Court of Equity. Those who have read "Bleak House" will remember that it was in this Hall that the great case of *Jarndyce* v. *Jarndyce* was fought at such interminable length. Now-a-days it is used for the most part as a lecture room. It was last used as a Court some years ago, when an inquiry was held into the sanity of a certain nobleman.

The Lawyers of Lincolns Inn.

Most of the members of this ancient foundation and practically all those who have chambers within its precincts, are Chancery men. The fusion of law and equity had never brought into being any large number of men who practice both in the King's Bench and Chancery Divisions. A mere common lawyer is not at home in a Court of Chancery: he does not know the practice. An equity draftsman or conveyancer has no experience of juries and will probably never have been in a criminal court in his life. It has been said that the Law is a jealous mistress. Her sister, Equity, has the same proud characteristic.

The Dinners in Hall.

During a certain part of each of the legal terms there are dinners in the hall. The dinner hour which for many years was

6 o'clock has recently been changed to 7 p.m. At the High Table certain of the Benchers dine each night. The junior Bar dines at a table specially set apart, paying for a capital dinner and excellent wine the very modest sum of 2s. 6d. The students, whose numbers alas! have been very much reduced of late, dine in the body of the hall. Every student in order to qualify for the Bar must have eaten 36 dinners spread over a period of 12 terms unless he gets a dispensation which may reduce the number to 24. Some wag once said that the reason a man eats dinners *before* he is called is that he runs a good chance of eating none afterwards! Time was when to eat his dinners was all that was necessary to qualify a man for the Bar but that has long since been changed. Examinations must be passed; which, by a strange anomaly, are not nearly so stiff and difficult as those to which candidates for the other branch of the profession must submit.

The Two Temples.

To the south of the Law Courts the wanderer will find the Inner and Middle Temples—the two Inns where common lawyers have their chambers. To pass from the rushing traffic of the Strand into these quiet courts is to be transferred from the 20th century way back into the middle ages! Each Inn has its own dining hall and library; but they have a common property in the glorious old Temple Church—one of the marvels of London—with its recumbent figures of the Knights Templars and its matchless organ. Although the greater part of the two Temples is given up to practising barristers, there are a number of sets of residential chambers especially on the top floors. Here, too, amongst the common lawyers the practice of dining is observed. At 5.30 every evening during dining term a curious sound may be heard. It is the porter who with a genuine horn—a cow's horn—is reminding members of the Inn that dinner will be ready at 6 o'clock. No one who has a few minutes to spare should miss the opportunity of taking a peep into the hall of the Middle Temple, and on his way thereto or therefrom he must inevitably pass the beautiful Temple Fountain where Tom Pinch and his sister used to spend their idle hours.

Grays Inn

Far away to the north—on the other side of Holborn—lies Gray's Inn. For one reason or another—but partly because of its distance from the Courts, this Inn has ceased to be the home of the practising barrister, although its Benchers still call men to the Bar and observe all the traditions of the other Inns. Gray's Inn Square is to a large extent filled with solicitors' offices. In Gray's Inn Gardens certain rooks paying no heed to their dingy surroundings still build their nests year by year.

Obiter Dicta.

One cannot help wondering why some judges are constantly making *obiter dicta!* It were so easy (to all appearance) to confine oneself to the issues before the court when hearing a cause or pronouncing judgment. Yet *obiter dicta* often find their way into reporter's note book—to be transcribed into the law reports—there to mislead and annoy whole generations of lawyers. An old judge once described an *obiter dictum* as "an individual impertinence which bindeth none, least of all him whose lips have uttered it": but it is not always easy for the busy practitioner to discern for himself or to persuade the court before which he is arguing that a particular passage in a judgment is *obiter*. No judge should lay down any principle which is not absolutely essential for the decision of the case before him. Any departure from this rule only leads to confusion.

Extra-Judicial Utterances.

If the ordinary *obiter dictum* is objectionable to the lawyer, there are certain extra-judicial utterances which are objectionable on much wider grounds. Some judges take advantage of their position to pronounce upon politics (in the wide sense of the term); the policy of a legislature; or some quasi-religious question. Unless the pronouncement is strictly germane to the matters in issue it were better omitted. It is to be regretted that Lord Shaw in the House of Lords has recently taken the opportunity of making what may indeed be described as an extra-judicial utterance. In the case of *Rex* v. *Halliday Ex p. Zadig* the validity of a regu-

lation made by His Majesty in Council pursuant to the Defence of the Realm Act, under which one Zadig had been interned was called in question. Five judges of the King's Bench, three Lords Justices (in the Court of Appeal), the Lord Chancellor and three Law Lords in the House of Lords were unaminous in holding the regulation to be *intra vires*. It remained for Lord Shaw to dissent, and incidentally to deliver himself as follows as to the Defence of the Realm Act: "Under this," he said, "the Government became a Committee of Public Safety. But its powers as such were far more arbitrary than those of the most famous Committee of Public Safety known to history. The analogy was with a practice, more silent, more sinister—with the *lettres de cachet* of Louis Quatorze. No trial: proscription: the victim might be 'regulated' —not in his course of conduct or of action, not as to what he should do or avoid doing. He might be regulated to prison or to the scaffold."

It is difficult to imagine anything more mischievous or less patriotic than such a tirade coming from such a quarter. Let it be said by a member of the House of Lords that the Government have tyrannical powers, and it will not be hard to find a stump orator who will go one step further and say that the powers of tyrants are being used. The passages above quoted appeared in the *Times*, and will, it is presumed, be embalmed in the *Law Reports* later on. Would that the censor had had the presence of mind to run his pen through them at the proper time!

Mixed Courts of Appeal.

Since what are known as the Judicature Acts, appeals from the Chancery and King's Bench Divisions of the High Court of Justice come before the Court of Appeal. That court consists of the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls as *ex officio* members, and five Lords Justices of Appeal. It generally sits in two divisions of three judges and the Master of the Rolls presiding in one court. Appeals from the Chancery Division are heard by a court in which equity judges are in the majority; while two of the three judges who hear from the King's Bench Division are generally common lawyers.

It sometimes happens that a mere common law judge is set to hear an appeal upon a point of equity with which his early training has not specially qualified him to deal. In such circumstances he generally remains silent during the argument, and allows his equity brethren to pull the labouring oars. In the recent case of *re Holt* (reported 116 *Law Times Reports* 270), the Master of the Rolls, Lord Justice Warrington, and Lord Justice Scrutton had to construe a will. The following summary which appears at the head of the report, gives some idea of the question to be discussed: "*Tenant for life or tenant in tail male—Equitable life estate—Subsequent gift to male issue of tenant for life in succession—Legal devise—Rule in Shelley's case.*" What should be the attitude of a mere common lawyer when asked to pronounce upon such a case? After his learned brethren had given judgment Lord Justice Scrutton, one of our leading commercial lawyers, delivered himself as follows:

"After listening attentively to the very interesting arguments with which the Court has been favoured, I have come to one clear conclusion, which is that I cannot usefully add anything to the views which have been expressed by my learned brothers. I therefore concur."

An Artistic Case with a Dramatic Ending.

The more serious business of the Courts has recently been interrupted. A judge was employed for 7 days trying whether a picture was or was not a Romney. It had been sold by a well-known London dealer to an American for £20,000. The purchaser brought suit to recover his money alleging a breach of warranty. No fraud was alleged. The views of the experts differed in an extraordinary way. One morning, however, before the case for the defendant had been fully developed, his learned counsel threw up the sponge. He said that after much diligent search his clients had discovered that the picture was not a Romney; that it was in fact a picture by Ozias Humphrey of the Ladies Horatia and Maria Waldegrave. A sketch was discovered in the library of the Royal Academy which was unquestionably the sketch for the disputed work. It had been sold as a portrait

by Romney of Mrs. Siddon's and her sister, although when the defendant bought it it was said to have been by Sir Joshua Reynolds. The defendant, however, backed his own opinion and gave the warranty. When at length the truth was revealed he acted like a man—consenting to return the money paid and to pay the costs. He also offered the picture, which is an artistic work of no small merit, to the British nation. The learned Judge took occasion to express the opinion which he had formed, namely, that the picture was not a Romney.

When Experts Differ.

The feelings of the experts whose judgment was at fault can be more easily imagined than described. One of the most distinguished had gone so far as to say that the Almighty himself would not convince him the picture was other than a Romney! As the *Times* pointed out in a leading article on May 24: "They (the experts) have erred, but there is balm in Gilead. They have only to recall the history of the bust by Richard Lucas with two square yards of British quilting material in its inside that Dr. Bode bought as a Leonardo da Vinci for the Kaiser Frederich Museum in 1908. The Prussian House of Lords, it will be remembered, afterwards affirmed by vote, in the teeth of evidence that the English artist's work—stuffing presumably and all—is and remains a Leonardo." But it is always a difficult matter to convince a Prussian of anything, as the British nation is at present finding to its cost.

Anonymous Libels.

The writer being minded to spend a very brief holiday in a West country village, was advised before he went to read a certain novel which could tell him a deal about the place. Having procured a copy of the novel from Mudies he read it. The novelist drew a very accurate picture of the village—under a different name; but he did more. He chose, as the puppets in his imaginary show, many of the local celebrities, "holding them up"—in the language of the law of libel—"to hatred, ridicule and contempt." The names, of course, were carefully concealed. In some cases,

too, the occupations of these victims were artfully changed; but there was no hiding their identity, even from one who, like the present writer, had only a brief knowledge of this country hamlet and its inhabitants. It appears that one of the persons thus pilloried went so far as to consult his lawyer, but from lack of means or for some other reason he never brought an action. It would have been an interesting suit, and—strange as it may seem—by no means hopeless from the plaintiff's point of view. Actions for libel have been prosecuted to a successful conclusion although the plaintiff was not mentioned by name—nay, even where he was given a new name in a mere work of fiction.

THE QUESTION IS NOT WHO IS MEANT? BUT WHO IS HIT?

In his *Law of Libel and Slander* (4th ed., p. 13), Sir Hugh Fraser writes: "Where the plaintiff alleges that he is the person referred to as the villain in a book or a story which purports to be a work of fiction, it seems that he must prove (1) that the author meant to refer to him, and (2) that the work was so written that those knowing the plaintiff would reasonably infer that he was intended." He cites in illustration *Pinnock* v. *Chapman & Hall Ltd.* (Times Newsp., Dec. 9 & 10, 1891) and says that the law was laid down in similar terms by Kennedy, J., in *Godfrey* v. *Bedford & Richards*, Winchester Summer Assizes, 1901.

In the first of the cases above referred to, the plaintiff, who had been for many years on the West Coast of Africa, came to live in England. The defendants published a novel in which the leading and most disreputable character was shown, to the satisfaction of the jury, to be the plaintiff under another name. They awarded a substantial sum in damages. The practitioner who is asked to advise as to the prospect of success in an action for libel should remember the celebrated *dictum* of Lord Loreburn, in *Jones* v. *Hallon* (1910) A.C. 20: "The question is not who is meant? but who is hit?" A novelist may say, on oath, "I meant to pillory no one" but if 10 good men and true come forward and say "We know he hit the plaintiff" and the jury are of the same opinion, a legal injury has been committed for which the novelist must pay damages. Although no remedy by action was sought

by any inhabitant of the village above mentioned, it is gratifying to know that when the novelist concerned endeavoured to obtain accommodation in the village after his book was published, all the lodging houses were closed to him

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WAR AND THE DISCHARGE OF CONTRACTS.

The law of contract will—as one of the minor results of the war—become greatly developed through decisions on the effect of the war on the contractual relationships of parties to a contract. A great number of the reported cases nowadays deal with matters of temporary importance only. Thus we find case after case determined on the construction of emergency statutes. These decisions may be of importance at the present time. But they will never furnish much additional material to the Judge-made law of contract. Their effect is transitory. Not only will these statutes cease to have any operation after the lapse of a few months of peace, but even in wartime their existence on the statute-book is essentially precarious, for statute follows statute with considerable rapidity, and what is now the emergency statute law of to-day may be entirely altered by some amending Act in the course of a month or two.

But the war decisions are by no means all of this type. There are cases being decided at this present time that will probably be quoted years hence as authorities which have developed the law. This is particularly the case as regards the law of contract. The effect of the war on contracts is a highly important matter at the present day. The effect of the war *quâ* war is, however, one thing. The effect of the war on contracts, in the sense of developing a general principle of law, resulting, no doubt, from the present abnormal circumstances, but nevertheless illustrating or developing a standing permanent principle of law, is quite another matter. It is to this latter type of case that we propose to address our attention. We propose to call the read-

er's attention to some of the very recent cases resulting from the war, but nevertheless developing a permanent principle of law. We propose to deal with such of these cases as treat of the effect of impossibility of performance on the rights of parties to contracts. Such cases are both of temporary and of permanent importance.

It is, of course, within common experience that the performance of contracts is being frequently interfered with in one way or another. The chief source—and, indeed, an increasingly frequent source—of interference is by Government departments and similar authorities under statutory powers. This interference may have any one of three results on a subsisting contract. It may disturb the parties in their dealings while leaving the contract on foot and their legal rights unaffected. Secondly, it may put an abrupt end to the contract. Thirdly, it may suspend the performance of the contract. With the first of these results we need not deal. Contractual relationships remain intact. Only a practical inconvenience is caused. It is to the second and third we propose that we shall call the reader's attention. We must review as briefly as possible the former authorities on this matter—the effect of unforeseen circumstances rendering performance impossible.

The root principle would appear to be this—that every contract must be performed. If a contract cannot be performed for some unforeseen reason, then the contract fails and the parties are discharged. Observe the inconsistency between these two statements. Yet these two statements seem fully justified by the authorities. They must be harmonized, and to bridge that difficulty the Courts have from time to time had recourse to divers doctrines. In support of the first principle—the root principle as we have called it—we may refer the reader to the well-known statement that a man must either perform his contract or pay damages for not performing it. "There seems to be no doubt," said Lord Blackburn in *Taylor* v. *Caldwell* ((1863), 3 B. & S. 826, at p. 833), "that where there is a positive

contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible."

That a contract should be held to be discharged because one party, as subsequent events prove, has made a bad bargain, could, of course, never be sustained as a proposition of law based on logic or convenience. But again and again the Courts have held a contract to be at an end when circumstances have subvened before the performance which render performance impossible. Logically, therefore, it would seem that the true position is this: If a man undertakes to perform a contract in clear, unconditional terms, he in effect undertakes to perform it, come what may. His contract is, indeed, to do or to procure the doing of the thing in question, and to pay damages if the thing for some foreseen or unforeseen circumstance is not done as agreed. That seems to be the true explanation. It is qualified only by this, that the thing to be done must be lawful. If a man purports to contract to do an unlawful act there is no contract. If the act would be lawful when the contract is made and becomes unlawful before performance, we have a refinement with which we need not deal.

The old case of *Paradine* v. *Jane* (1647), Aleyn, 26, and, indeed, all the covenant cases for repairing houses where lessees have been held bound to rebuild after fire, may be cited as illustrating the general principle that mere burdensomeness is not a ground for relieving a man from his contract. In *Paradine* v. *Jane* a lessee was sued for rent. He had been put out of possession by rebels, who kept him out so that he could not take the fruits of the demise or enjoy the property. Yet he was held bound to pay rent. It is obvious that a covenant to pay could be in fact discharged notwithstanding that the covenantor was out of possession.

The Courts have always been ready to find some ground on which to qualify the application of the general root principle

that a man must perform his contract or pay damages where unforeseen circumstances render performance impossible. There seem to me two main grounds for escaping the consequences of the root principle. It may, however, be doubted whether logically there is not, indeed, one ground only. However, in the present state of the development of the law of contract it is better to recognize the two grounds for exception. The first is that there is some tacit condition for the continuance of circumstances rendering performance possible. The second is that the whole contract falls to the ground and is gone, in so far as any future performance is concerned.

The case of *Taylor* v. *Caldwell, supra,* is an instance of the application of and an authority for the proposition that where the Court finds that there is some implied or tacit condition that some state of circumstances rendering performance possible should continue to exist, then, if for same unforeseen reason that state of circumstances ceases to exist, the parties are absolved from the contract. Thus in *Appleby* v. *Myers,* 16 L.T. Rep. 669; L. Rep. 2 C.P. 651, the plaintiffs contracted to erect certain machinery in the defendant's building and to keep the machinery in repair for two years. When some of the work had been done the premises were destroyed by fire, so that the plaintiffs were not able to perform their contract. It was held that both parties were excused from any further performance of the contract. Again, in *Baily* v. *De Crespigny,* 19 L.T. Rep. 681; L. Rep. 4 Q.B. 180, a man covenanted not to build on certain land, and bound himself and his assigns (with notice) accordingly. The land was taken by a railway company under statutory powers and they built on the land, but the Court held that the covenantor was discharged from his contract. Again, in *Robinson* v. *Davison,* L. Rep. 6 Ex. 1, a lady was engaged to perform on the piano at a concert to be given by the plaintiff. Unfortunately when the day arrived she was ill and unable to perform, and this fact was held to discharge the contract on the ground that her ability to perform was a tacit condition.

These contracts for personal service illustrate the general principle, although no doubt they are *à fortiori* cases. "It must be conceded," said Chief Baron Pollock in *Hall* v. *Wright*, E.B. & E. 746, at p. 793, "that there are contracts to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them. So a contract by an author to write a book, or by a painter to paint a picture within a reasonable time, would, in my judgment, be deemed subject to the condition that, if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death." It is only a step further than this clear-cut principle which would reach this proposition, that every contract entered into between reasonable men contemplates the continuance of a state of circumstances in which performance is still possible; and if performance subsequently becomes impossible through no fault of the parties, then the circumstances have ceased to exist, and it is by the contract that the contract becomes discharged. We would repeat our warning that so far the Courts have not quite countenanced this view, preferring rather to put it on failure of the contract altogether. Apparently the ground for shrinking from this step—a logical step, it seems to us—is that it would be too risky to embark on constructing hypothetical terms to a contract. There are indications of this in the two cases of *Blakeley* v. *Muller and Co.* and *Hobson* v. *Pattenden and Co.*, 88 L.T. Rep. 90; (1903), 2 K.B. 760n., which were heard together on appeal. Those cases concerned the hiring of seats for King Edward's coronation procession on a certain day. The procession did not take place, and the Court held that the contracts were discharged, but not void *ab initio*, and that the loss must remain where it was at the time of abandonment. The Court would not find a term that was not

expressed as to how the parties were to stand if the procession did not take place. The matter was dealt with as if a pair of scissors had cut the whole thing in two and left the parties to their respective ends.

The judgments in the recent case of *F. A. Tamplin Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited*, 115 L.T. Rep. 315; (1916), 2 A.C. 397, and in the even more recent case of *Metropolitan Water Board* v. *Dick, Kerr and Co.*, 142 L.T. Jour. 385; (1917), W.N. 98, go to shew that the theory respectfully put forward above will in due course be recognized as the true ground for holding contracts discharged by reason of subsequent impossibility of performance. These judgments certainly seem to imply that a tacit condition that there shall be a continuance of the possibility of performance is the real ground for holding a contract discharged when performance has become impossible through unforeseen circumstances. The first of these two recent cases is a House of Lords case. A tank steamer was chartered for sixty months at a fixed sum per month. On the outbreak of the war the ship was requisitioned by the Admiralty, and certain alterations were made in her for her new purpose. There were then nearly three years of the charter term to run. The owners claimed the charter-party had been determined by the requisition. The charterers were prepared to continue to pay the agreed freight, and they contended that the charter-party was still subsisting. The House of Lords took the latter view.

Lord Haldane, who, with Lord Atkinson, dissented, expressed the view that the contract was gone as the use of the ship and the fulfilment of the purposes of the charter had been swept away by a *vis major* for a period to which no limit could be assigned. It would seem to be, at any rate, partly upon the authority of this view that the second of these two recent cases was decided. In this second case (*Metropolitan Water Board* v. *Dick, Kerr and Co.*) the defendants had agreed to construct a large reservoir for a certain sum within six years, and under the

contract all tools, etc., brought by them on to the works were for the time being to be the property of the plaintiffs. When the work had been started and tools, etc., to a considerable value had been brought on to the works, the Minister of Munitions, acting under statutory powers, ordered the defendants to cease and to hold their plant and labour at the disposal of the Minister. The tools, plants, etc., or a considerable part of them, were removed by the direction of the Minister and sold to munition factory owners. The men were nearly all taken away from the works. The plaintiffs claimed that in these circumstances the contract was only suspended. Under the contract the engineer had power to allow an extension of time for completing the contract because of any difficulties or impediments. The Court held, however, that it was discharged, on the ground that there was more than a temporary prohibition—the continuance of a state of war being too uncertain to be regarded as temporary.—*Law Times.*

JUDGMENTS, UNANIMOUS AND OTHERWISE.

Incidentally the *Zadig Case* shews very forcibly the advantages of the procedure of the House of Lords as contrasted with that of the Judicial Committee of the Privy Council. The Judicial Committee in form merely advises the Crown, and it delivers a single judgment from which all dissent has by the nature of things to be eliminated. Whether, having regard to the nature of its jurisdiction, this is under the special circumstances the most convenient course we need not express an opinion. It may be that a judgment which is to settle a dispute in a remote part of the world ought to carry the appearance of a unanimous sentence, however much disagreement there may have been in arriving at it. But there can be no question that, for appeals in this country to the House of Lords, the rule of separate judgments best accords with the spirit and traditions of our law.—*Solicitors' Journal.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

NEGLIGENCE — UNBROKEN COLT LOOSE ON HIGHWAY AT NIGHT — INJURY TO PERSON USING HIGHWAY.

Turner v. *Coates* (1917) 1 K.B. 670. This was an action to recover damages for injuries sustained by the plaintiff on a public highway in the following circumstances. The plaintiff was travelling on the highway at night on a bicycle on which she carried a light, and she was on the proper side of the road. The defendant's unbroken colt was loose on the highway and ran against the plaintiff so that she fell off her wheel and was injured. The defendant intended that the colt should follow a boy who was walking in front leading a mare, but the colt not being under any control did not carry out his intention. The County Court Judge who tried the action held that the defendant was guilty of negligence and liable in damages for the injury in question, and the Divisional Court (Lush, and Bailhache, JJ.), affirmed his decision.

CONTRACT—SALE OF GOODS—SOLD NOTE — CONDITION — ASSENT OF BUYER—CONDITION, WHEN NOT BINDING.

Roe v. *Naylor* (1917) 1 K.B. 712. This was an action for breach of a contract for the sale of timber. The sale had been made by an agent and a sold note delivered to the plaintiffs, the buyers, which contained on the left hand side the following words: "Goods are sold subject to their being on hand, and at liberty, when the order reaches the head office." When this particular order reached the head office it was found that the timber had been previously sold, and was consequently not on hand, and the defendants relied on the condition as exonerating them from the performance of the contract. The County Court Judge who tried the action gave judgment for the plaintiff, but the Divisional Court (Bailhache, and Atkin, JJ.), ordered a new trial, being of the opinion that it was a question of fact whether or not the clause in question was so printed that an ordinary careful business man reading the document with reasonable care might miss it, and that unless that was so, the condition would be binding; and that the County Court Judge had not directed his mind to the proper question, he being of opinion that it was

necessary for the defendants to draw the plaintiff's attention to the condition, and because they had not done so, therefore, it was not binding.

SALE OF GOODS — CONTRACT — REMAINDER OF CARGO "MORE OR LESS, ABOUT," SPECIFIED QUANTITY.

In re Harrison and Micks (1917) 1 K.B. 755. This was a case stated by arbitrators. The question was as to the meaning of a contract for the sale of the remainder of a cargo of wheat "more or less about 5,400 quarters." The buyer accepted delivery of about 5,400 quarters. The seller had in fact made a miscalculation and "the remainder" amounted to 574 quarters more than the 5,400 quarters. One of the rules indorsed on the written contract provided "the word 'about' when used in reference to a quantity shall mean within five per cent. over or under the quantity stated." The buyer claimed that, by virtue of this rule, he was not bound to accept more than 270 quarters in addition to the 5,400 quarters, but the Divisional Court (Bailhache, and Atkin, JJ.), held that the contract was controlled by the word "remainder" and that the buyers were bound to accept "the remainder" whatever it might amount to, irrespective of the rule relied on.

LANDLORD AND TENANT—BREACH OF COVENANT TO REPAIR—NOTICE TO REPAIR—ACCEPTANCE OF RENT AFTER SERVICE OF NOTICE TO REPAIR—WAIVER OF FORFEITURE—CONTINUING BREACH —CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44-45 VICT. C. 41), S. 14 (1)—(R.S.O. C. 155, S. 20 (2)).

New River Co. v. *Crumpton* (1917) 1 K.B. 762. This was an action by lessors to recover possession of the demised premises for breach of a covenant by the lessees to repair. The plaintiffs had given notice to the defendants to repair as required by the Conveyancing and Property Act 1881, s. 14 (1), (R.S.O. c. 155, s. 20 (2)), and had subsequently accepted payment of an instalment of rent. The defendants contended that in these circumstances no action for possession would lie until a new notice to repair should be given, and that the acceptance of rent operated as a waiver of the forfeiture; but Rowlatt, J., who tried the action, held that although the acceptance of rent was a waiver of the forfeiture up to the date of its receipt, yet as the breach complained of was a continuing breach, the acceptance of the rent did not waive forfeiture for non-repair after that

date, and he held that such being the case, and the premises being still out of repair, no fresh notice was necessary, following *Penton* v. *Barnett* (1898) 1 Q.B. 276, 281, although in that case some stress was laid on the fact that the premises in question were in the same physical condition as to repair as when the notice was given, whereas in the present case some repairs had been done subsequent to the notice.

CONTRACT TO DO WORK UPON GOODS AND RE-DELIVER — GOODS BURNT BY ACCIDENT ON CONTRACTOR'S PREMISES — REASONABLE TIME.

Shaw v. *Symmons* (1917) 1 K.B. 799. This was an action to recover damages for breach of a contract to do work on goods and re-deliver them. The goods in question were books to be bound by defendants. No time was specified for their delivery. On January 7, 1916, the plaintiffs demanded delivery of the whole of the books then bound, and on two occasions prior to the 20th January telephoned to the defendants, pressing for delivery. The defendants neglected to deliver the books, and on 20th January they were burnt by accidental fire on the defendants' premises. The defendants at the trial sought to excuse themselves on the ground of difficulties of transport, and shortage of labour, but this had not been previously set up as an excuse, and Avory, J., who tried the action, held that a reasonable time had elapsed from the demand for delivery, and that the defendants were guilty of a breach of contract, and liable for the loss of the goods.

HUSBAND AND WIFE—CONTRACT—SUPPLY OF GAS TO HOUSE OCCUPIED BY WIDOW — WIDOW RE-MARRYING AND CONTINUING OCCUPATION OF HOUSE—NON-DISCLOSURE TO GAS COMPANY OF RE-MARRIAGE—LIABILITY.

Lea Bridge District Gas Co. v. *Malvern* (1917) 1 K.B. 803. The plaintiffs, a gas company, sued the defendant, a married woman, for gas supplied to a house occupied by her in the following circumstances. The house in question was originally occupied by the defendant and a former husband. After his death gas was continued to be supplied to the house, of which she continued in occupation, and was from time to time paid for by her. Subsequently she married again, and her seecond husband came to reside with her in the same house, and the plaintiffs, without notice of such second marriage, continued to supply gas. The defendant paid for one quarter's account for gas,

after her re-marriage, but not having paid for a later quarter the present proceedings were instituted. The defendant contended that she was not liable, as she was not the consumer of the gas, that there was no contract between her and the plaintiffs, and that she was a married woman residing with her husband, who was the tenant and occupier of the premises to which the gas had been supplied. The justices who heard the complaint gave effect to these contentions, and dismissed the complaint, but stated a case for the opinion of the Court, and a Divisional Court (Lord Reading, C.J., and Ridley, and Lush, JJ.), held that the justices were wrong, and that, in the circumstances, the defendant continued liable to the company until she notified them of her re-marriage.

HUSBAND AND WIFE—ACTION BY WIFE AGAINST HUSBAND FOR RESCISSION OF SEPARATION DEED—FRAUD—ACTION OF TORT — RESTITUTIO IN INTEGRO — MARRIED WOMEN'S PROPERTY ACT, 1882 (45-46 VICT. C. 75), S. 12—(R.S.O. C. 140, S. 16).

Hulton v. *Hulton* (1917) 1 K.B. 813. This was an appeal from the decision of Lush, J. (1916, 2 K.B. 642, noted ante p. 13). The action was by wife against husband to set aside a separation deed made between them, on the ground of fraud and misrepresentation. One question was whether the action was for "tort" within the meaning of the Married Women's Property Act, 1882, s. 12 (R.S.O. c. 140, s. 16), and another was, whether the deed having been made on an agreement that all letters between the parties should be destroyed, could now be set aside as it was impossible to restore the parties to their former position, the letters having been in fact destroyed: the Court of Appeal (Eady, Bankes, and Scrutton, L.JJ.), agreed with Lush, J., that the action was not for a tort within the meaning of the section, and that the destruction of the letters was no bar to a rescission of the deed. The Court of Appeal also held that the defendant was not entitled to a refund of moneys paid under the deed as a condition of its rescission, because he had received corresponding benefits under the deed.

RESTITUTION OF CONJUGAL RIGHTS — SEPARATION DEED — COVENANT BY WIFE NOT TO SUE FOR THE RESTITUTION OF CONJUGAL RIGHTS—ORDER MADE NOTWITHSTANDING COVENANT.

Phillips v. *Phillips* (1917) P. 90. This was an action by a wife for the restitution of conjugal rights. The husband did not appear. On the hearing of the petition it appeared that the

parties had entered into a separation agreement which contained a covenant on the part of the wife not to sue for restitution of conjugal rights. The plaintiff contended that the Court was under no obligation to regard the covenant unless pleaded by the defendant, and Low, J., so held, and made the order as prayed.

PROBATE—LOST WILL—CONTENTS—ATTESTATION CLAUSE — ATTESTING WITNESS NOT PRODUCED—NO EVIDENCE OF IDENTITY OF WITNESSES TO WILL—PRESUMPTION OF DUE EXECUTION.

In re Phibbs (1917) P. 93. This was an application for probate of a will which had been lost. It appeared that the day before the death of the testator he requested one Knox to see that a cash box in his possession was handed to Miss Blanche Smith after his death. Knox took the box to Miss Smith and they together examined the contents and found therein a will which both read carefully. It was dated December 7, 1911, and appointed Tweedy, a Dublin solicitor, executor. The will was sent by registered post to Tweedy; but was believed to have been destroyed in a fire at the Dublin Post Office during a civil commotion. Miss Smith had been for fifteen years acting as a clerk in a solicitor's office and from memory she wrote the contents of the will which according to her statement bequeathed to her a legacy of £100, a like legacy to a nephew who had in fact been killed shortly before the testator's death, a small legacy to Mr. Tweedy the executor, and the residue to Miss Smith. Some letters of the testator to the executor were found with the will, which in many respects confirmed Miss Smith's statement. Miss Smith was a niece and one of the next of kin of the testator. Beyond the statement of Knox and Miss Smith that the will appeared to have been duly executed in the presence of two witnesses, there was no evidence as to who the witnesses were, or of execution of the will, although an effort had been made, by advertisement, to discover the witnesses. The other next of kin appeared and assented to the grant. In these circumstances Low, J., granted probate of the will in the terms sworn to by Miss Smith.

COMPANY — MEMORANDUM OF ASSOCIATION — CONSTRUCTION — STATEMENT OF OBJECTS — ULTRA VIRES — COMPANIES CONSOLIDATION ACT, 1908 (EDW. VII. c. 69) s. 3—(R.S.O. c. 178, s. 6 (2) (*b*)—(R.S.C. c. 79, s. 7 (*b*)).

In re Anglo Cuban Oil Co. (1917) 1 Ch. 477. This was an application to remove the name of a company from the list of

contributors to another company being wound up in the following circumstances. The applicants were the Essequibo Rubber Co. The memorandum of association of that company specified that the company might engage in almost every conceivable business which an individual could engage in, and was wide enough to cover the underwriting the shares of other companies. The applicants did underwrite the shares of the Anglo-Cuban Oil Co., which shares were allotted to the London and Mexican Exploitation Company. All three companies being in liquidation the liquidator of the Anglo Cuban Oil Company settled the London and Mexican Exploitation Co. on the B list; and the Essequibo Co. on the B list. The Essequibo Co. then applied to be struck off the list, on the ground that their underwriting of the shares in question was *ultra vires* of that company. Neville, J., refused the application; and the Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, L.J., and Lawrence, J.), affirmed his decision. Both Warrington, L.J., and Lawrence, J., express doubts as to the propriety of the registrar registering companies with such an unlimited specification of objects in their memorandum of association.

INSURANCE—PRE-WAR CONTRACT—MORTGAGE OF LIFE POLICIES—ASSURED BECOMING ALIEN ENEMY—SUBSEQUENT PAYMENT OF PREMIUMS—REDEMPTION OF MORTGAGE BY SURETY—SURETY'S RIGHT TO TRANSFER OF SECURITIES — TRADING WITH THE ENEMY.

Seligman v. *Eagle Insurance Co.* (1917) 1 Ch. 519. This was an action for redemption by a surety. The mortgage security consisted of policies on the life of the mortgagor, and the plaintiff was a surety for the payment of the debt secured by the mortgage. The policies were effected before the outbreak of the war in 1914 when the assured became an alien enemy and left the country. The surety subsequently paid the premiums, and ultimately tendered the whole debt, subject to the policies being transferred to him, but the mortgagees declined to transfer the policies except subject to the reservation that they did not warrant the validity of the policies. Neville, J., who tried the action, held that the war had not the effect of putting an end to the policies; that the payment of premiums to keep the policies alive was not a trading with the enemy, as no benefit could result to the alien enemy under the policies pending the war, but that his rights were suspended during the war. He therefore

held that the plaintiff was entitled, on payment of the debt secured, to a transfer of the policies without any such reservation as that proposed by the defendants.

COMPANY — DEBENTURE — NO PLACE OF PAYMENT — DUTY OF DEBTOR TO SEEK HIS CEDITOR—INTEREST AFTER DUE DATE — LIABILITY OF COMPANY.

Fowler v. *Midland Electric Corporation* (1917) 1 Ch. 527. This was an action by the executor of a debenture-holder of a limited company to recover the amount of the debenture, one of a series. The debenture specified no place of payment. It was secured by a mortgage to trustees for the debenture-holders, and on the day named for payment the company had paid to the trustee the amount of the debenture and interest, and about the same time in 1913 wrote to the holder of the debenture informing her of the payment, and that the debenture should be sent to a specified bank for payment; but it turned out that the debenture-holder had died some months previously; subsequently the defendants were informed that the plaintiff was the executor of the deceased debenture-holder, and he obtained probate in November, 1913, but he put the debenture away with other papers, and forgot all about it until 1916. The company paid the principal and interest up to the due date, and the interest which had been earned on the money while in the hands of the trustee, but they objected to pay any more interest. The action was therefore brought to recover the difference between the amount of the interest at the rate borne by the debenture, and that tendered, and Eve, J., held that the plaintiff was entitled to succeed.

MORTGAGE—ASSIGNMENT OF INTEREST IN TRUST FUND—NOTICE OF MORTGAGE TO TRUSTEES OF FUND—SUBSEQUENT PAYMENT OF INCOME TO MORTGAGOR — RELIEF OF TRUSTEE — JUDICIAL TRUSTEES ACT 1896 (59-60 VICT. C. 35), S. 3 (R.S.O. C. 121 S. 37).

In re Pawson, Higgins v. *Pawson* (1917) 1 Ch. 541. In this case one Pawson, who was entitled to a life interest in the income of certain stocks and other personal estate in the hands of trustees of a settlement, executed a mortgage of his interest to the plaintiff, Higgins, to secure a loan. Higgins gave notice of his mortgage to the trustees but did not demand that the income

should thereafter be paid to him, and the trustees, *bonâ fide*, continued to pay it to the mortgagor for about a year and a half, when the plaintiff brought the present action claiming to recover all income which had accrued since the giving of the notice; but Sargent, J., who tried the action, held that the mere giving of notice of the mortgage was not equivalent to taking possession of the mortgaged property, but had no further effect than the giving notice of a mortgage of real estate, and did not deprive the mortgagor of the right to continue to receive the income. He held therefore that the action failed as against the trustees; but he was also of the opinion that even if the payment were wrong, it was a case for granting the trustees relief under the Judicial Trustees Act, 1896, s. 3 (see R.S.O. c. 121, s. 37), and that it was not necessary for them to plead the Act as a defence.

TRADE MARK—APPLICATION TO REGISTER — SURNAME "CRAWFORD."

In re Crawford (1917) 1 Ch. 550. This was an application to register the name "Crawford" as a trade mark for biscuits, cakes and shortbread, and the application was refused, it appearing that it was a common surname in Scotland, and not uncommon in England; although it was shewn that the name had been identified for twenty years with the applicants' goods, for which they had acquired an extensive trade in Scotland and England.

RAILWAY—CARRIAGE OF GOODS — OWNER'S RISK CONSIGNMENT NOTE—CONSTRUCTION — "NON-DELIVERY OF ANY CONSIGNMENT."

Great Western Ry. Co. v. *Wills* (1917) A.C. 148. This was an appeal from the decision of the Court of Appeal, 1915, 1 K.B. (noted ante vol. 51, p. 234). The case turns upon the construction of a consignment note for 752 carcasses of frozen mutton, whereby it was provided that they should be carried at a reduced rate and that the defendant railway company should be relieved from "all liability for loss, damage, misdelivery, delay or detention" unless arising from the wilful misconduct of their servants, but not from any liability they might otherwise incur in the case of "non-delivery of any package or consignment fully and properly addressed" and that "no claim in respect of goods for loss or damage during the transit" should be allowed

unless made within three days after delivery of the goods in respect of which the claim was made, or "in the case of non-delivery of any package or consignment" within fourteen days after despatch. When the consignment arrived at its destination there were twelve of the carcasses missing. A claim was made by the consignor within fourteen days from the despatch of the whole consignment, but not within three days from the delivery of the rest of the carcasses. The Court below considered that the non-delivery of the twelve carcasses was "the non-delivery of a consignment," and therefore that the plaintiff's claim was made in time. The majority of the House of Lords considered that the "non-delivery of a consignment" in the consignment note, meant non-delivery of the consignment as a whole, and that it was really a question of fact whether the delivery of the 740 carcasses was a substantial delivery of the consignment, notwithstanding the shortage in delivery, and that, strictly speaking, there ought to be a new trial on that question; but the amount involved being small, the parties agreed to waive a new trial, and their Lordships (Lords Loreburn, Haldane, Kinnear, and Parmoor—Lord Shaw dissenting), disposed of the case on the assumption that the delivery of the 740 carcasses was a substantial delivery of "the consignment," and therefore that the time for making claim was limited to the three days from that delivery and the plaintiff was therefore too late. Lord Shaw considered that "the delivery of the consignment" meant the delivery of every part of it, and that the omission to deliver any part of it was a "non-delivery of the consignment;" but the majority thinking otherwise the appeal was therefore allowed.

JURY—FAILURE TO REVISE JURY LIST—VERDICT—NEGLECT TO OBSEVE STATUTORY REGULATIONS.

Montreal Street Ry. v. *Normandin* (1917) A.C. 170, deserves attention. It was an appeal from a Quebec Court and the question raised thereby was as to the validity of a verdict given in a civil action, where the proper officers had neglected to revise the list of jurors as required by R.S.Q. c. 909, art. 3426; and it was claimed that one of the jury was disqualified from being a juror under art. 455 (2) of the Code. Their Lordships the Judicial Committee of the Privy Council (Lords Haldane, Buckmaster, Dunedin, and Parker, and Sir A. Channell), found that

there was no evidence in support of the alleged disqualification of a juror, and that it had not been established that the appellants had been really prejudiced, and they therefore came to the conclusion that in the circumstances the statutory provisions as to making the jury panel should be regarded as directory, and the omission to comply therewith did not render the jurors who tried the case disqualified from acting as jurors. The appeal therefore failed.

A NEW CURE FOR MOBS.

Inter arma legis silent does not seem to be a maxim of universal application. Recently a mob gathered around a jail in a Virginia city clamouring for the blood of a prisoner confined therein and manifesting a strong disposition to overcome the guards and break in the jail door. The Judge of a local Court mounted the jail steps, accompanied by his clerk and bailiff, opened Court in due form, and announced that any person disturbing the peace in that vicinity would be committed for contempt. The crowd promptly withdrew and the riot was over. Even allowing something for the American sense of humour, the incident affords some scope for reflection. Every man in that mob was guilty of a felony and liable to a penalty more severe than any which could be imposed for contempt, but that did not in the least deter them from their unlawful enterprise. What made the difference? Simply that in the one case the apprehended penalty was certain and immediate, while in the other it existed only in the dim future, beyond a hundred delays and a myriad of possible salvation-working quibbles. The lesson is plain and emphatic. When criminal trials are prompt and businesslike, with technicalities summarily brushed aside, punitive justice will gain immeasurably in its deterrent effect, and penalties can be humanized without detracting from that result.—*Law Notes.*

Reports and Notes of Cases.

Province of Alberta.

SUPREME COURT.

Harvey, C.J., and Stuart, Beck, and Walsh, JJ.] [34 D.L.R. 514.

REX v. LEVERTON.

1. *False pretences—Fraud of employee tendering under cover of a trade name—Obtaining rejection of lower tender.*

Where an employee makes representations to his employer to the effect that a tender for the supply of goods to the latter is an actual *bonâ fide* one from an independent tenderer, whereas it was in fact, although unknown to the employer, the employee's own tender, submitted in a different trade name through such employee's nominee, the employee may properly be convicted of obtaining by false pretences the additional money which, by means of such tender and his employer's reliance on the same as independently made, he obtained for the goods supplied over and above the amount for which the employer would have obtained them by acceptance of a competitive tender which the employee fraudulently caused to be rejected.

R. v. *Cooper*, 2 Q.B.D. 510, 46 L.J.M.C. 219, considered.

2. *Indictment—False pretences.*

An indictment or charge for obtaining money under a false pretence is not bad for not setting out what the false pretence was or stating to whom it was made. (Code secs. 852, 1152, Code form 64 (c)).

A. A. McGillivray, for the Crown; *J. McKinley Cameron*, for accused.

ANNOTATION ON ABOVE CASE IN D.L.R.

In a charge for obtaining goods by false pretences it must be proved (1) that a false pretence was made, (2) that the prosecutor believed the pretence, and (3) that the goods were obtained by means of the pretence. *R.* v. *King*, [1897] 1 Q.B. 214.

The offence declared by Code sec. 405 of the Criminal Code 1906 applies to "anything capable of being stolen" and which is obtained by any false pretence as defined by sec. 404. And sec. 405A makes it an indictable offence for a person in incurring any debt or liability to obtain credit "under false pretences or by means of fraud." The definition of "false pretense" contained in Code sec. 404 is as follows:—

"404. A false pretense is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

"(2). Exaggerated commendation or depreciation of the quality of anything is not a false pretense, unless it is carried to such an extent as to amount to a fraudulent misrepresentation of fact.

"(3). It is a question of fact whether such commendation or depreciation does or does not amount to a fraudulent misrepresentation of fact."

The false pretence need not be made in words or writing, it may be made "otherwise" and it will suffice if it is signified by the conduct and acts of the accused. *R.* v. *Létang* (1899), 2 Can. Cr. Cas. 505.

To render a defendant liable, his false representation must have been with regard to a past or existing matter, not to a future undertaking as that he will pay for goods on a certain day. *Mott* v. *Milne*, 31 N.S.R. 372; *Regina* v. *Bertles*, 13 U.C.C.P. 607.

The false pretence must be a false representation, express or implied, as to the past or present existence of some fact; a mere promise as to future conduct, or representation as to future expectations are not sufficient. For instance, the giving a cheque in exchange for goods is ordinarily a representation that the drawer has an account at the bank on which the cheque is drawn, and that that account is in such condition that in the ordinary course of events the cheque will be met. If the drawer knows that these conditions do not exist, the giving of the cheque is in law a false pretence. But representations of future expectations, unless they are representations of existing facts, do not constitute a false pretence, and obtaining goods on credit by means of such representations is not obtaining goods by false pretences. The false pretence may be made in any way, either by words, by writing, by conduct. It is no excuse to say that a person of common prudence could easily have found out the pretence was untrue, nor to say the existence of the alleged fact was impossible, or that it was intended to make compensation for the goods in the future. Tremeear's Criminal Code sec. 404; *R.* v. *Martel*, 27 Can. Cr. Cas. 316.

Where goods are obtained on the faith of the buyer's cheque given in payment therefor, a charge of false pretence of an existing or present fact, as distinguished from a future event, is sustainable, although there may have been funds in the bank to the credit of the drawer at the precise time of delivery of the cheque or of the receipt of the goods, if it be shewn that the drawer issued other cheques at about the same time, the payment of which had been planned to so reduce the fund that the cheque in question would be dishonoured and that the drawer had no credit arrangements with the bank for an overdraft. *R.* v. *Garten*, 22 Can. Cr. Cas. 21, 13 D.L.R. 642.

A charge of obtaining goods by false pretences through the giving in payment by his agent of a worthless cheque against the principal's account will lie against the principal if it be shewn that the latter deliberately planned that the cheque should not be paid for lack of funds at his credit in the bank and had re-sold the goods and applied the proceeds to his own use, and this whether or not the agent was aware of the fraud. *R.* v. *Garten* (1913), 22 Can. Cr. Cas. 21, 29 O.L.R. 56, 13 D.L.R. 642; *R.* v. *Garrett*, 6 Cox C.C. 260; *R.* v. *Hazelton*, L.R. 2 C.C.R. 134, 13 Cox C.C. 1.

The giving of a post-dated cheque implies no more than a promise to have sufficient funds in the bank on the date thereof and is not, in itself, a false representation of a fact past or present. *R.* v. *Richard*, 11 Can. Cr. Cas. 279.

False pretences may be founded on the false idea conveyed fraudulently by the accused; it is not requisite that the false pretence should be made in express words. *R.* v. *Holderman*, 23 Can. Cr. Cas. 369, 19 D.L.R. 748.

A person may be convicted of obtaining the return to himself of his own promissory notes from the payee if such return is obtained under false pretences, and it is not a ground of defence that the notes were overdue when so obtained. *Abeles* v. *The King* (1915), 24 Can. Cr. Cas. 308, 24 Que. K.B. 260.

In Stephen's Digest of the Criminal Law, p. 161, it is said:—

"The words, 'Whosoever shall, by any false pretence, obtain, from any other person, any chattel, and with intent to defraud,' seem simple enough, but they are obviously open to an interpretation which would make any dishonest breach of contract criminal. A man who buys goods, which he does not intend to pay for, may be said to obtain them by a false pretence of his ability and intention to pay. The Courts, however, soon held that this was not the meaning of the statute, and that, in order to come within it, a false pretence must relate to some existing fact. . . A mere lie, told with intent to defraud, and having reference to the future, is not treated as a crime. A lie, alleging the existence of some fact which does not exist, is regarded as a crime, if property is obtained by it."

In *Alderson* v. *Maddison*, 5 Ex. D. 303, Stephen, J., said, and Lord Selborne referred to it, on the appeal, with approval:—

"To say, 'I have cancelled the bond,' when you have not, is to tell an untruth. To say: 'I intend to cancel the bond' is to make a statement as to a present revocable intention. If a person chooses to act on such a representation, without having it reduced to the form of a binding contract, he knows, or ought to know, that he takes his chance of the promisor changing his mind, and therefore he is in no worse position, if the statement is false when it is made, *i.e.*, if the intention is not really entertained, than if it is true when it is made, *i.e.*, if the intention exists, and the person making the statement intends to revoke it, if he pleases."

Where a defendant hired a bicycle, of the value of $20, representing that he wished to use it to go to L., for the purpose of visiting his sister, and, instead of returning the bicycle, sold it to C.:—*Held*, that evidence which shewed these facts, was not sufficient to support a conviction for having "unlawfully, and by false pretences obtained from X. one bicycle, of the value of $20," the prosecutor not having been induced and not intending to part with his right of property in the goods, but merely with the possession of them, and there being no representation as to a present or past matter of fact. *Rex* v. *Nowe*, 36 N.S.R. 531, 8 Can. Cr. Cas. 441. But see Code sec. 347 as to the offence of theft by conversion of the property. Tremcear's Criminal Code, sec. 347; *R.* v. *Kelly*, 27 Can Cr. Cas. 94, 140 and 282, 34 D.L.R. 311.

A person who does not otherwise make a false representation himself but who is present when it is made, knows it to be false, and gets part of a sum of money obtained by such false pretence, is guilty of obtaining such sum of money by false pretences. *The Queen* v. *Cadden*, 4 Terr. L.R. 304, 5 Can. Cr. Cas. 45.

In order to establish the offence of obtaining money by false pretences it is necessary to prove what was laid down by Buckley, J., in *Re London and Globe Finance Corporation*, [1903] 1 Ch. 728. He said: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury." *R.* v. *Bennett* (1913), 9 Cr. App. R. 146 at 154.

On an indictment for obtaining money by false pretences it is essential that the jury should understand that there should be no conviction without an intent to defraud, and, unless such intent is clear from the facts, they should be directed on the point; they should also be directed that the obtaining must be due to the false pretense alleged. *R.* v. *Ferguson*, 8 Cr. App. R. 113; *R.* v. *Boyd*, 4 Can. Cr. Cas. 219; *R.* v. *Brady*, 26 U.C.Q.B. 13.

But where the statement relied upon and shown to be false could not have been made with any other object than that of

defrauding the prosecutor, it is not reversible error that the jury was not instructed specially on the question of intent. *Rex* v. *Carr* (1916), 12 Cr. App. R. 140.

An intent to defraud may be inferred from the wilful use of a forged instrument to support a genuine claim. *Rex* v. *Hopley*, 11 Cr. App. R. 248.

In *Rymal's* case, 17 Ont. R. 227, the defendant, by untrue representations, made with knowledge that they were untrue, induced the prosecutor to sign a contract to pay $240 for seed wheat. The defendant also represented that he was the agent of H. whose name appeared in the contract. H. afterwards called upon the prosecutor and procured him to sign and deliver to him a promissory note in his H's favour for the $240. The contract did not provide for giving of a note, and when the representations were made the giving a note was not mentioned. The prosecutor, however, swore that he gave the note because he had entered into contract. The defendant was indicted for that he, by false pretences, fraudulently induced the prosecutor to write his name upon a paper so that it might be afterwards dealt with as a valuable security; and upon a second count for, by false pretences, procuring the prosecutor to deliver to H a certain valuable security:—*Held*, upon a case reserved that the charge of false pretences can be sustained as well where the money is obtained or the note procured to be given through the medium of a contract, as when obtained and procured without a contract; and the fact that the prosecutor gave a note instead of the money, by agreement with H. did not relieve the prisoner from the consequences of his fraud; the giving of the note was the direct result of the fraud by which the contract had been procured; and the defendant was properly convicted on the first count as being guilty of an offence under R.S.C. ch. 164, sec. 78; *Regina* v. *Rymal*, 17 O.R. 227.

In *Regina* v. *Hope*, 17 Ont. R. 463, the defendant was indicted in the first count of the indictment for obtaining from one H. a promissory note with intent to defraud, and in the second count with inducing H. to make the said note, with like intent. The evidence shewed that on May 4th, 1887, the defendant's agent called on H. and obtained from him an order addressed to defendant to deliver to H. at R. station 30 bushels of Blue Mountain Improved Seneca Falls Wheat, which H. was to put out on shares, and to pay defendant $240 when delivered, and to equally divide the produce thereof with the holder of the order, after deducting the said amount. On 23rd May defendant called, produced the order, and by false and fraudulent representations as to the quality of the wheat and his having full control of it, its growth and yielding qualities, and that a note defendant requested him to sign was not negotiable, induced H. to sign the note. Evidence was received, under objection, of similar

frauds on others shewing that the defendant was at the time engaged in practicing a series of systematic frauds on the community. The defendant was found guilty and convicted:—*Held*, on a case reserved, that the conviction should be affirmed on the second count, as the evidence shewed that the note was signed by H., not merely to secure the carrying out of the contract contained in the order, but on the faith of the representations made; and it was immaterial that a note was taken when the order called for cash; and, also, that the evidence objected to was properly receivable. *R.* v. *Hope*, 17 Ont. R. 463.

The defendant was foreman of works on roads, and certified to the inspector A. that certain persons had worked under him and were entitled to pay. He also produced orders for this pay purporting to be signed by those persons, but which in fact were not genuine. The inspector A. delivered the money to D. his agent, with instructions to pay it to the defendant if satisfied of the genuineness of the orders. On an indictment for obtaining money under false pretences from D. the defendant was found guilty, and the conviction was upheld on a case reserved. *Regina* v. *Cameron*, 23 N.S.R. 150.

There may be an intent to defraud although the prosecutor got something which was of real value for his money. Where money is obtained by pretences that are false, there is, *primâ facie*, an intent to defraud, although this presumption may by displaced. *R.* v. *Hammerson* (1914), 10 Cr. App. R. 121.

In a New Brunswick case, the prisoner wrote to the prosecutor to induce him to buy counterfeit bank notes. The prosecutor, in order to entrap the prisoner and bring him to justice, pretended to assent to the scheme, arranging a meeting place of which he informed the police, and had them placed in position to arrest the prisoner at a signal from the prosecutor. At such meeting the prisoner produced a box which he said contained counterfeit bank notes, which he agreed to sell the prosecutor on payment of a sum agreed upon. The prisoner gave a box which he pretended to be the one containing the notes to the prosecutor, who then gave the prisoner $50 and a watch as security for the balance which he agreed to pay.

The prosecutor immediately gave the signal to the police and seized the prisoner and held him until they arrested him and took the money and watch from him. On examining the box given the prosecutor it was ascertained that he had not given him the one containing the notes as he pretended, but a similar one containing waste paper. The box containing the notes was found on the prisoner's person. It was clear and undisputed that the motive of the prosecutor in parting with the possession of the money and the watch, as he had done, was to entrap the prisoner. The prisoner was found guilty of obtaining the money and watch of the prosecutor by false pretence of giving him the counterfeit notes, which he did not give.

On a case reserved for the opinion of the Court the minority opinion given by Allen, C.J., and Palmer, J., was that in order to complete the crime of obtaining property by false pretence, there must not only be the false pretence but an actual parting and intention to part with the property of the person imposed upon by the pretence; that the prosecutor here never intended to part with his property in the money and watch, and that the conviction should be quashed.

They were also of the opinion that as the prosecutor only expected to receive from the prisoner counterfeit notes which were of no value, it was extremely doubtful whether he could be said to have been defrauded because he received worthless goods of another kind. But it was held by the majority of the Court of six Judges that the prisoner was rightly found guilty, and that the conviction should be affirmed. *Regina* v. *Corey*, 22 N.B.R. 543.

On a charge of obtaining goods by false pretences by giving a bill of exchange due in seven weeks where some of the averments made were that the accused professed to be a man of financial strength and able in due time to meet the bill, it was held to be proper to admit in evidence for the prosecution the bank account of the accused and proof of the number of cheques on it being dishonoured during the time of the transaction. *R.* v. *Fryer* (1912), 7 Cr. App. R. 183.

Upon a trial for false pretences, it is competent, in order to prove intent, to shew that the accused made similar representations about the same time to other persons, and by means of such false representations obtained goods: Wharton, Crim. Law, 8th ed., sec. 1184; and other acts, part of the same system of fraud, may be put in evidence. *Reg.* v. *Francis*, 12 Cox C.C. 612, 43 L.J. Mag. Cas. N.S. 97, L.R. 2 C.C. 128; *R.* v. *Wyatt*, [1904] 1 K.B. 188; Tremeear's Cr. Code, sec. 404.

If there is evidence of two persons acting together and one assents to a false representation made by the other as an inducement to a contract, such assent may amount to a false pretence by conduct. *R.* v. *Grosvenor* (1914), 10 Cr. App. R. 404.

A postmaster transmitted to defendant several post office orders, which defendant in connivance with him presented and got cashed. The orders were fraudulently issued as no moneys had been received by the postmaster for transmission to the defendant, and frauds to a large extent had been thus committed. Defendant was held properly convicted of having obtained these sums with intent to defraud. And, semble, that defendant might also have been properly convicted under another count of indictment charging him with having obtained the money by false pretences. *Regina* v. *Dessauer*, 21 U.C.Q.B. 231.

When in an indictment for obtaining by false pretences, one of the pretences alleged was that defendant was carrying on a

genuine business in buying and selling pigs, the mere fact that he did not keep any pigs in his own possession, nor hold an option of purchase, does not establish falsity of his advertisement offering pigs for sale where he was in the habit of having deliveries made direct by the breeders. If it were open to the jury to find that the advertisement meant that he was ready to supply pigs of the description advertised, although not in his possession or control, the practical withdrawal of that view in the charge to the jury will be a ground for quashing the conviction. *R.* v. *Jakeman* (1914), 10 Cr. App. R. 38.

In *R.* v. *Lee*, 23 U.C.Q.B. 340, the prisoner sold a mare to B. taking his notes for purchase money, one of which was $25 and a chattel mortgage on a mare as collateral security. After this note had matured he threatened to sue, and B. got one R. to pay the money, the prisoner promising to get the notes from a lawyer's office, where he said they were, and give them up next morning. This note, however, had been sold by the prisoner some time before to another person, who afterwards sued B. upon it, and obtained judgment:—*Held*, that the prisoner was properly convicted of obtaining the $25 by false pretences. *Regina* v. *Lee*, 23 U.C.Q.B. 340.

In *Reg.* v. *Cooper*, 13 Cox C.C. 617, 46 L.J.M.C. 219, the accused was charged with falsely pretending that he was a dealer in potatoes, and as such dealer, in a large way of business and in a position to do a good trade in potatoes and able to pay for large quantities of potatoes, as and when the same might be delivered to him. The only evidence thereof was a letter from the prisoner to the prosecutor, reasonably conveying to the mind the construction put upon it in the indictment. Lord Coleridge, C.J., is reported (at p. 620) as follows:—

"The question for the Court, as I understand the case, is whether there was evidence upon which the false pretences alleged in the indictment could fairly be sustained. It was a question for the jury whether the false pretences alleged did or did not reasonably arise from the letter. The true principle applicable to this case was well enunciated by Blackburn, J., during the course of the argument in *Reg.* v. *Giles*, 10 Cox C.C. 44: 'It is not requisite that the false pretence should be made in express words, if the idea is conveyed.'"

Denman, J., at p. 622, said:—

"In *Reg.* v. *Giles*, 10 Cox C.C. 44, the prisoner pretended that she had power to bring the prosecutrix's husband back, and that was held to be a statement of fact. That warrants us in holding that where a man is not in a position to do what he professes he will do at a given time, he is making a false statement of fact. The indictment charges that the prisoner falsely pretended that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, and that pretence, I think, is proved by the letter."

And Pollock, B. (*R.* v. *Cooper*, 13 Cox C.C. 617, 622), says:—

"Having heard the whole of the argument, I have come to the conclusion that the conviction should be affirmed. It is not sufficient for the prisoner to shew that the letter might bear another meaning, if it is reasonably capable of bearing the meaning imputed to it in the indictment. It is the duty of the prisoner to shew by special circumstances that it bore the construction he contends for. I think that the false pretences charged may be fairly inferred from the letter, and that the conviction should be affirmed."

In the case of *Edgington* v. *Fitzmaurice*, L.R. 29 Ch.D. 459, at 483, Bowen, L.J., is reported as follows:—

"There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."

It is open to a jury to find that a trade name has been assumed with intent to defraud. *R.* v. *Whitmore* (1914), 10 Cr. App. R. 204.

If a person offers in exchange for goods the promissory note of another, he is to be taken to affirm, although he says nothing, that the note has not to his knowledge been paid either wholly or to such an extent as to almost destroy its value. *R.* v. *Davies* (1859), 18 U.C.Q.B. 180.

There are cases where the facts disclose that what was obtained by the false pretence was a contract, and that it was in pursuance of the contract that the goods were obtained; but on such facts a conviction for obtaining goods by false pretences was held to be good. *R.* v. *Kenrick* (1843), Davison & M. 208; 5 Q.B. 49; 12 L.J.M.C. 135.

The case of *R.* v. *Gardner*, 25 L.J.M.C. 100, has given rise to discussion. In that case the prisoner pretended to be a naval officer, and by reason of that false pretence obtained lodging; after he had been there some little time he entered into a contract with the prosecutrix to be supplied with meat and drink on specified terms. It was held that it was in pursuance of the contract, and not of the false pretence, that the goods were obtained; he was indicted for obtaining the goods by false pretences, and in the circumstances the Court held that there had been no continuing false pretence, and that the goods had been obtained, not by means of the original false pretence, but by means of contract.

The decision in *R.* v. *Kenrick*, 5 Q.B. 49, was followed in *R.* v. *Abbott*, 1 Den. C.C. 273, 2 C. & K. 630, in which case a strong Court of ten Judges held that a false pretence knowingly made to obtain money is indictable, though the money be obtained

by means of a contract which the prosecutor was induced to make by false pretence of the prisoner; therefore the mere fact that the money was obtained by means of a contract does not seem to revent the operation of the law on the ground that the money was obtained equally by the false pretence as by the contract.

R. v. *Gardner*, 7 Cox C.C. 136, which followed *R.* v. *Abbott*, 1 Den. C.C. 273, and cannot be said to overrule it, because two Judges were parties to the two decisions, was clearly decided on the ground that there was no continuing false pretence, and therefore, although at first sight the two cases seem a little out of harmony, when the facts are looked at it is not so. Per Coleridge, J., in *R.* v. *Moreton* (1913), 8 Cr. App. R. 214. In the last mentioned case, Coleridge, J., added: "*R.* v. *Martin*, L.R. 1 C.C.R. 56, 36 L.J.M.C. 20, leaves the law in no doubt; it was held there that the fact that the goods are obtained under a contract does not make the goods so obtained goods not obtained by a false pretence, if the false pretence is a continuing one and operates on the mind of the person supplying the goods." *R.* v. *Moreton* (1913), 8 Cr. App. R., 214, at p. 217.

The false pretence alleged in a Nova Scotia case was by representing himself to be the owner of a vessel, whereas at the time he had transferred ownership to another person who had again transferred to defendant's wife. The representation to the prosecutor that he was owner was made some three or four months before and was by appending the style "Owner" to his signature to a letter in relation to another matter:—*Held*, that the pretence was too remote to warrant a conviction. And that the term "Owner" has no definite meaning in law, and does not mean "registered owner" of a ship. *Regina* v. *Harty*, 31 N.S.R. 272, 2 Can. Cr. Cas. 103; and see *R.* v. *Brady*, 26 U.C.Q.B. 13.

"Obtaining money or property by false pretences" is an extradition crime within the meaning of the Extradition Act and the extradition arrangement between Great Britain and the United States of America. *Re F. H. Martin* (No. 2), 2 Terr. L.R. 304, 8 Can. Cr. Cas. 326.

Bench and Bar

Judicial Appointments.

Hon. John Alexander Mathieson, of the City of Charlottetown, New Brunswick, K.C., to be Chief Justice of the Supreme Court of Judicature of Prince Edward Island, vice Hon. Sir Wilfred Sullivan, resigned. (June 13, 1917.)

Canada Law Journal.

VOL. LIII. TORONTO, AUGUST-SEPTEMBER, 1917. Nos. 8 & 9

THE LAW OF COMMON CARRIERS.

THE RESPONSIBILITY OF THE CROWN WHEN ACTING AS A COMMON CARRIER.

By Charles Morse, K.C., D.C.L.

It has for a long time been accepted as a principle of law that the Crown, in respect of the conveyance of goods over Canadian Government railways, is not in the position of a common carrier. In the case of *Lavoie* v. *The Queen*, 3 Can. Ex. 96, the learned trial Judge made the following observation:—

"In *The Queen* v. *McLeod* (8 Can. S.C.R. 1), the majority of the Court, following *The Queen* v. *McFarlane*, 7 Can. S.C.R. 216, held that the Crown, in respect of government railways, is not a common carrier."

In view of its importance the soundness of this doctrine is well worth a careful enquiry.

Before discussing the opinions of the Judges in the two Supreme Court cases above mentioned, it would be well to examine some pertinent provisions of the Exchequer Court Act and the Government Railways Act, and then review the principles upon which the legal liability of a common carrier are based.

In the first place, by sec. 19 of the Exchequer Court Act, R.S.C. 1906, ch. 140, it is provided that "The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown."

Then turning to the Government Railways Act, R.S.C. 1906, ch. 36, it is abundantly clear that parliament, in enacting certain of its provisions, contemplated that the government railways would carry on the business of common carriers. For instance, by sec. 46 of the said Act the Governor-in-Council may impose and authorize the collection of tolls and dues upon any

railway vested in His Majesty. By secs. 49, 50 and 51 the Governor-in-Council may make regulations for the ascertaining and collection of the tolls, dues and revenues on such railway; for imposing fines for the violation of any such regulation; and for the detention and seizure, at the risk of the owner, of any carriage, animal, timber or goods on which tolls or dues have accrued and have not been paid. It is also noteworthy that by clause (*h*) of sec. 2 of the Act, "toll" is defined to include any rate or charge, or other payment payable for any passenger, animal, carriage, goods, merchandize, matter or thing conveyed on the railway. Furthermore, clause (*i*) declares that "goods" includes things of every kind that may be conveyed upon the railway, or upon steam or other vessels connected therewith.

Our object in quoting these statutory enactments is merely to show, *expressis verbis*, how far parliament intended to place the Crown in the position of a common carrier, and to give a remedy for its breach of duty as such.

In the second place, we shall proceed to examine the principles underlying the common carrier's liability at common law.

A common carrier may be defined to be a person who undertakes for hire or reward to transport the goods of such as employ him from place to place. *Dwight* v. *Brewster*, 1 Pick. 50. The following definition from one of the older books has been specially commended both for brevity and exactness: "Any one who undertakes to carry the goods of all persons, indifferently, for hire, is a common carrier." *Gisbourn* v. *Hurst*, 1 Salk, 249 (91 E.R. 220) Cf. *Liver Alkali Co.* v. *Johnson*, L.R. Ex. 267. These definitions bring the obligations of a common carrier within that branch of the law of contract known as bailments. The bailment of common carriage falls within the fifth of Sir William Jones' classifications, viz., *locatio operis mercium vehendarum*. Jones, Bail. 36.

Yet the common carrier's liability is something more than that of an ordinary bailee. Cf. Van Zile on Bailments, 2nd ed., sec. 29 (*c*). Lord Mansfield in *Forward* v. *Pittard* (1785), 1 T.R. 27 (99 E.R. 953) at p. 33, says:—"It appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident except by the act of God or the King's enemies.

Now as to railways. "That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules, of the common law, and make them eminently common carriers." *Per* Shaw, C.J. in *Norway Plains Co.* v. *Boston & Maine Rd.* (1854), 1 Gray 263, p. 269.

Now, while the Crown is liable in actions arising out of contract, it is clear law that it is not liable to the subject in actions of pure tort except where made so by statute. *Tobin* v. *The Queen*, 16 C.B. (N.S.) 355; *City of Quebec* v. *The Queen*, 24 Can. S.C.R. 420. However, it is equally certain that the Crown

is liable for all breaches of contract no matter whether they depend on its servant's breach of duty or otherwise. In *Brown* v. *Boorman*, 11 Cl. & F. 1, (8 E.R. 1003), at p. 44, Lord Campbell said: "Whenever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract."

In the case of the *Windsor & Annapolis R. Co.* v. *The Queen* (1886), 11 App. Cas. 607, the claim rested on a trespass by the Crown's servants in ejecting the suppliants from a railway over which the Crown had contracted to give them possession and control for a stated period. Lord Watson, in delivering the judgment of their lordships, said (p. 613):—"A suit for damages, in respect of the violation of the contract, is as much an action upon the contract as a suit for performance: it is the only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance has become impossible."

In *Tobin* v. *The Queen* (1864), 16 C.B. N.S. 310, at p. 355, Earle, C. J., said "Claims founded on contracts and grants made on behalf of the Crown . . . are within a class legally distinct from wrongs."

"No civil wrong is a tort if it is exclusively the breach of a contract. The law of contracts stands by itself, as a separate department of our legal system, over against the law of torts; and to a large extent liability for breaches of contract and liability for torts are governed by different principles. It may well happen, however, that the same act is both a tort and a breach of contract . . . Thus he who refuses to return a borrowed chattel commits both a breach of contract and also the tort known as conversion: a breach of contract, because he promised expressly or impliedly to return the chattel; but not merely a breach of contract, and therefore also a tort, because he would have been equally liable for detaining another man's property, even if he had made no such contract at all." Salmond's Jurisprudence, 2nd ed., p. 435. Finch, J., in *Rich* v. *New York Central, etc., R. Co.*, 87 N.Y. at p. 390, said:—"We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu*, and those as clearly *ex delicto* there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult . . . Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent of his principal or the lawyer of his client, the ground of duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test."

How far the undertaking of a common carrier protrudes itself into the

border-land of obligations mentioned by Finch, J., is shown by the following extract from Keener on Quasi-Contract, p. 18:—"Of a quasi-contractual nature, it is submitted, is the duty of a carrier, founded upon the custom of the realm to receive and to carry safely. That the liability in such cases arises not from contract, but from a duty, is clear. While it is true that the liability is ordinarily described as one in tort, it is submitted that it has been so described because of the usual classification of legal rights into contracts and torts, and that since the obligation imposed upon the carrier is to act, the obligation is really quasi-contractual in its nature, and not in the nature of a tort."

Mr. Keener's view that the obligation of the carrier sounds in contract rather than in tort is strongly supported by the opinion of Lord Mansfield in *Forward* v. *Pittard*, quoted *ante*, and by that of Lord Kenyon, C.J., in *Buddle* v. *Willson* (1795), 6 T.R. 369 (101 E.R. 600), where he says, at p. 373, that a declaration against a carrier on the custom of the realm is, in substance, *ex contractu*. In the report of this case in the Revised Reports, vol. 3, at p. 202, the syllabus reads: "The cause of action in the ordinary case of an action against a common carrier is essentially *ex contractu*." In the editorial note to *Buddle* v. *Willson*, (*ubi sup.*) we find the following:—"Lord Kenyon's judgment in *Buddle* v. *Willson*, as well as the case of *Boson* v. *Sandford*, on which it is founded, is impeached by Lord Ellenborough in *Govett* v. *Radnidge*, 3 East, 62, 69 (102 E.R. 520). But the principle is reaffirmed by Sir J. Mansfield, C.J., in *Powell* v. *Layton*, 2 Bos. & P. (N.R.) 365, (127 E.R. 669), and Mr. Dicey (On Parties, p. 20) after reviewing these, with other conflicting authorities, supports the view of Sir J. Mansfield." Let us first quote Mr. Dicey's exact words, and then proceed with those of Sir James Mansfield in the case last mentioned, as they are both of high authority. Mr. Dicey says (p. 20.):—"In spite of conflicting decisions, the doctrine laid down by Sir J. Mansfield, C.J., is (it is submitted) in theory correct. Actions for torts, founded on contract, though in form actions for tort, are in reality actions for breach of contract. They owe their existence to the fact that for technical reasons . . . declarations were often framed in tort where the real cause of action was the breach of a contract." In *Powell* v. *Layton*, Sir James Mansfield, said (pp. 369, 370):—"Let us see what is meant by the defendant's duty? How did he undertake any duty, except by his agreement to carry and deliver the goods? The duty of a servant or the duty of an officer I understand, but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract . . . The form of the action cannot alter the nature of the transaction; the form of the transaction is originally contract." See also *Baltimore and Ohio R. Co.* v. *Pumphrey*, 59 Md. 390; and Pollock on Torts, 10th ed., p. 558.

It would appear from this examination of the authorities establishing the criteria of the carrier's obligation, that the remedy for a breach of that obligation extends itself within the province of contract rather than within that of tort.

Turning now to a consideration of the Supreme Court cases of *The Queen* v. *McFarlane*, and *The Queen* v. *McLeod*, it is well to bear in mind that when they were decided, the Dominion Petition of Right Act, 1876, was in force.

By that Act the subject in Canada was put in the same position as the subject in England under "Bovill's Act," 23 and 24 Vict. (U.K.) ch. 34. His petition, after a fiat was obtained thereon, was cognizable in the Exchequer Court of Canada. The question of the liability of the Crown in damages for breach of contract, was pursued with great historical research and acumen by the Court of Queen's Bench in the case of *Thomas* v. *The Queen* (1874), L.R. 10 Q.B. 31, and it was held on the authority of the *Banker's* case (14 How. St. Tr. 1), that the Crown had always been liable to the subject in matters of contract. Parliament, in enacting the Dominion Petition of Right Act of 1876, made it clear that there was no intention of giving to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances, by the laws in force there prior to the passing of the English statute above mentioned. That Act distinctly negatived any intention of giving to the subject any remedy which he would not have been theretofore entitled to. In other words, the English Petition of Right Act is to be regarded as nothing more than a statute of procedure. (See Clode on Pet. Right, p. 176.) Furthermore, by the sec. 58, of the Supreme and Exchequer Courts Act, then in force, it was provided that the Exchequer Court should have "exclusive jurisdiction in all cases in which the demand shall be made or relief sought in respect to any matter which might in England be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown." By all of which it appears that when the *McFarlane* case and the *McLeod* case were decided the subject in Canada has as full a remedy in the Exchequer Court against the Crown for breach of contract as the subject in England had at that time. Bearing this in mind let us proceed to examine the decisions of the Supreme Court of Canada in the cases mentioned.

Dealing first with the *McFarlane* case, the petition of right set out that a quantity of timber and logs belonging to the suppliants while in transit through certain slides and booms belonging to the Dominion Government on the Ottawa River were lost "by reason of the unskilful, negligent and improper conduct" of the slide-master. The claim sounded in tort, and the Crown pleaded that there was no liability, on its part, for the negligent acts complained of, and that no contract with the suppliants was shown for breach of which a petition would lie. So that as the action was shaped and presented to the Court, there was no jurisdiction under the statutes mentioned to entertain it. Beyond this, it is submitted, that the expressions of the Judges are *obiter*. Ritchie, C.J., while negativing any analogy between the case and that of a common carrier (p. 236) thought that even if a contract of carriage could have been made out upon the facts as between subject and subject, in any event the Crown would not have been liable as a common carrier on grounds of public policy, relying therefor upon *Whitfield* v. *Lord DeSpencer*, 2 Cowp. 764. Taschereau, J., concurred with the Chief Justice. Strong, J. (at pp. 242, 243) said:—"Without enquiring whether this analogy between the liability of the Crown and a private person for a breach of contract arising from the laches and negligence of an agent is correctly assumed, it appears very clear that there is no room for applying it in the present case, for the petition of right does not show any contract on the part of the Crown to pass the timber

safely through the slides, either expressly or impliedly entered into by the parties, as in the case of a carrier undertaking the carriage of goods, or arising by operation of law." Gwynne, J. (p. 244) regarded the case shaped in the petition as one of pure tort. So that the *McFarlane* case, thus analyzed, hardly affords a sure foundation for the doctrine that the Crown is not a common carrier in respect of government railways in Canada.

In the *McLeod* case the suppliant had been seriously injured in an accident while being carried as a passenger on a government railway. He had paid for and obtained a first-class ticket for his transportation between certain points, and was occupying a seat in a first-class car when the train was derailed. Having alleged in his petition that he had been received as a passenger upon a promise to be carried safely for reward between such points, the suppliant charged that "Her Majesty, disregarding her duty, in that behalf, and her said promise, did not safely and securely carry the suppliant . . . but so negligently and unskilfully conducted, managed and maintained the said railway, and the train upon which the suppliant was a passenger . . . that . . . suppliant was greatly and permanently injured in body and health, etc."

It will be observed that the *McLeod* case, as shaped in the petition of right, was not an action for the breach of an ordinary contract of common carriage in respect of which the carrier would be liable without negligence being shown. Railway companies are not common carriers as regards passengers. (See *per* Lindley, L.J., in *Dickson* v. *Great Northern R. Co.* (1886), 18 Q.B.D. at p. 185; Macnamara's Law of Carriers (2nd ed.) p. 519.) A carrier of passengers is not, as such, liable as a common carrier of goods. (*East Indian Ry. Co.* v. *Kalidas Mukerjee*, [1901] A.C. 396); but when a carrier of passengers also holds himself out as a carrier of goods, he is a common carrier *qua* the goods. (*Dickson* v. *G. N. R. Co.*, 18 Q.B.D. 183.) That Ritchie, C.J., appreciated the distinction between the *McLeod* case and that arising under a true contract of common carriage appears at pp. 20, 23 of the report. He says:—"This is, in my opinion, unquestionably a claim sounding in tort, a claim for a negligent breach of duty. A carrier of passengers is not an insurer." If the learned Chief Justice had stopped there, the case would hardly have been an authority for the proposition or doctrine in question. But he proceeds to take up the threads of an enquiry into the reasons of the Crown's immunity from ordinary civil actions, begun by him in the *McFarlane* case,—and finally arrives at the conclusion that "the establishment of the government railways in the Dominion is . . . a branch of the public police, created by statute for purposes of public convenience and not entered upon or to be treated as private mercantile speculations . . . To say that these great public works are to be treated as the property of private individuals or corporations, and the Queen, as the head of the Government of the country, as a trader or common carrier, and as such chargeable with negligence, and liable therefor, and for all acts of negligence or improper conduct in the employees of the Crown, from the stoker to the Minister of Railways, is simply to ignore all constitutional principles." The majority of the Court also thought that the case could not be distinguished in principle from the *McFarlane* case, but Fournier, J., in his able dissenting judgment (p. 40) points out that the two

cases are distinguishable inasmuch as the claim in the *McFarlane* case was for a pure tort while in the *McLeod* case "two essential elements for the existence of a contract of conveyance are to be found; on the part of *McLeod*, a good and valid consideration given in exchange for the service demanded, by paying the railway fare according to the tariff—on the part of the government, by the handing over of a passenger ticket as evidence of the promise to convey the respondent from C. to S."

The *McLeod* case was decided in 1883, and comparing it with the *Windsor and Annapolis Railway* case, decided by the Judicial Committee of the Privy Council three years later (1886), 11 App. Cas. 607, and referred to *ante*, it will be seen that Fournier, J's, view that the Crown was liable for a tortious breach of contract is supported by Lord Watson's observations in the case last mentioned. Furthermore, Fournier, J., expressly controverted the argument put forward by the majority of the judges in the *McFarlane* and *McLeod* cases to the effect that it would be contrary to the interests of administration and public convenience to hold the Crown liable as a trader or common carrier in respect of railways and other undertakings operated by the government; and it is both interesting and important to note that Sir Barnes Peacock, in *Farnell* v. *Bowman* (1887), 12 App. Cas. 643, at p. 649, takes much the same view of the *ab inconvenienti* argument against the Crown's liability in these matters as Fournier, J., does. His language is so much to the point that it would almost seem that he expressly intended to impugn the conclusions of the majority of the Supreme Court of Canada in the cases mentioned. He says:—"It must be borne in mind that the local governments in the colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the King can do no wrong', were applied to colonial governments . . . it would work much greater hardship that it does in England."

The Supreme Court of Georgia, in *Western & Atlantic Rd.* v. *Carlton* (1850), 28 Georgia, at p. 182, might be cited as arriving at the same conclusion by a parity of reasoning:—"It is insisted that the State is not a common carrier, and is not subject to the rules of law which apply to common carriers. When a State embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character and is subject to like regulation with persons engaged in the same calling."

It is convenient at this place to note that the Judicial Committee of the Privy Council has decided that the Crown, represented by a colonial government, can be chargeable with a warehouseman's obligations as a bailee.

In the case of *Brabant & Co.* v. *King*, [1895] A.C. 632, the question is decided unequivocally in the affirmative. The Government of Queensland had, under the provisions of the Queensland Navigation Act of 1876 (41 Vict. No. 3), accepted from the plaintiffs certain explosives and stored them in one of their magazines at Brisbane under the control of the Governments servants, charging the plaintiff storage-rent for the same. The Act provided that if such storage-rent was not paid, the goods might be sold by the Government.

While the goods were so in storage the River Brisbane rose to an exceptional height and flooded the magazine. The plaintiffs' goods were rendered valueless by their immersion in water. Lord Watson, in delivering the judgment of their lordships, at p. 640, said: "Their lordships can see no reason to doubt that the relation in which the Government stood to the appellant company was simply that of bailees for hire. They were therefore under a legal obligation to exercise the same degree of care towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled store-keeper . . . And that obligation included not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred."

The question naturally arises after a perusal of this case, why should the Crown be held liable as a warehouseman and not as a common carrier?

We have already quoted the remarks of Burbidge, J., in *Lavoie* v. *The Queen* upon the question of the Crown's liability as a common carrier. That case was decided in the year 1892, 16 years after the Dominion Petition of Right Act was passed, and some 5 years after the Exchequer Court Act of 1887 became law. It will be remembered that the latter provided, *inter alia*, that the Court should have jurisdiction in any case "in which the claim arises out of a contract entered into by or on behalf of the Crown." The *Lavoie* case was essentially a case of common carriage. In 1905, the case of *The Nicholls Chemical Co.* v. *The King*, came before Burbidge, J., on a petition of right for damages for the loss of a certain quantity of acid while in transit over a railway owned and operated by the Dominion government.

In the interval between the decision in the *Lavoie* case and that in the one last mentioned, the learned Judge seems to have modified somewhat the view implicit throughout his reasons in the former case that the Crown can be in no sense a common carrier. But he does not conceive of the Crown being liable as an insurer. He says (9 Can. Ex. at p. 278): "The Crown is not in regard to liability for loss of goods carried in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of such goods, and any special contract made is, in general, in mitigation of its common law obligation and liability. The Crown, on the other hand, is not liable at common law except under a contract, or where the case falls within the statute under which it is in certain cases liable for the negligence of its servants." Here we see that the learned Judge relies upon the very technical principle underlying the carrier's responsibility as an insurer (namely, that such responsibility does not arise out of the carrier's contract, but is cast upon him by the "custom of the realm") to place an action against the carrier for failure to carry and deliver the goods wholly within the domain of tort. But with all deference we would point out that to do this is to ignore the opinions of Lord Kenyon in *Buddle* v. *Willson*, of Sir James Mansfield in *Powell* v. *Layton*, and of Lord Campbell in *Brown* v. *Boorman*, cited and discussed *ante*, as well as those of text writers of high authority, certain of which we have passed in review. Remembering that common carriage is a bailment, it is noteworthy that Burbidge, J., in *Johnson* v. *The King* (1903), 8 Can. Ex. 360), found no difficulty in holding the Crown liable as a bailee for hire in respect of the duty

of such a bailee to take reasonable care; yet the duty to take reasonable care in the bailment of hire (*locatio rei*) is as much an obligation, superimposed by law upon the actual contract, as the duty of an insurer is in the case of the bailment of common carriage (*locatio operis mercium vehendarum*). As Dr. Holland puts it:—"What is called, with reference to carriers, the 'custom of the realm,' is really a term implied by law in the contract of carriage." (Elem. of Juris., 9th ed., p. 241.) Finally, when we read the following observations by the Court on the contract in *Johnson* v. *The King*—"Such a contract involved all its usual terms and incidents, as well those that were expressed as those that arose by law upon the contract being entered into"—we fail to see any ineluctable reason why the Crown should not be held liable under a petition of right based upon a bailment of common carriage.

As a result of our review of the cases in the Supreme Court of Canada, and in the Exchequer Court of Canada, we venture to think that the doctrine that the Crown, in respect of the conveyance of goods over the government railways of Canada, cannot be held liable as a common carrier, is unsound. Furthermore, we think it reasonably clear that under the Dominion Petition of Right Act of 1876, read in conjunction with the Supreme Court and Exchequer Court Acts of 1875, the Crown might have been held liable on an undertaking to carry goods to the same extent as an ordinary common carrier; and that under subsequent remedial legislation embodied in the Exchequer Court Act (R.S.C. 1906, ch. 140) and the Government Railways Act (R.S.C. 1906, ch. 36), this liability, both in its contractual and delictual aspects, is established beyond doubt.

UNIFORMITY OF LAWS IN THE WESTERN PROVINCES.

It seems that there was no probant reason for the division of Alberta, Saskatchewan and Manitoba into three distinct provinces. There was an ethnical one for the division of Upper and Lower Canada. There might have been a justification in the separation of the Maritime Provinces on account of their respective origins, and British Columbia was also in a special position.

But as the Western, or I should rather mention them by their appropriate name, the Central Provinces, were all taken from Rupert's Land, they derive their respective individualities from the same source. Their traditions are alike, the conditions of the soil and their respective geographical positions are the same and they are inhabited by a population ethnically identical so it is a pity that their political Governments should not be one with one common aim, one common administration, one common system of Courts.

We must face the situation as it is but there is no reason, however, why we should go on and accentuate the divergence once we see the advantage of creating some uniformity and we should seek to attain a desirable uniformity in our respective laws, so as to bring them in unison with the homogeneousness of our natural conditions, our ethnical situation, our needs and our mutual, continuous and frequent association with each other.

It seems clear that the people of the central prairie provinces would welcome some uniformity of laws which would simplify mutual relations of citizens of the three provinces, which would render the knowledge of the laws more accessible to the lay mind and render the practice of lawyers easier and as a consequence would redound to the benefit of the clients.

The people of Manitoba have many dealings in land and grain with the citizens of the other provinces of the west, and wholesalers and manufacturers deal as much with Saskatchewan and Alberta as with Manitoba merchants.

Many Manitobans own land, farms and town losts in Saskatchewan and *vice versa*. As a matter of fact there are few days when some law firms in Winnipeg are not called upon to advise upon some Saskatchewan transactions.. And there is no business day that does not see some banking or other mercantile dealings going through between us and our sister provinces.

If we agree upon the desirability of creating some uniformity of laws between the central provinces along what lines shall the attempt be made and upon what laws shall the reform apply?

As to the former, I shall discuss a little further. But as to the laws which would need action I could say: all the laws relating to real property, to personal property, especially grain and farm stock and machinery, and to probate matters as well as to Court procedure and practice.

First, as to land. We have now in all the three provinces a Torrens system. In Alberta, Saskatchewan and the new territory of Manitoba there is practically no old system of registration but all lands are under the Torrens system. Crown patents are not sent by Ottawa to the owners, but to the Land Titles Office where

they are exchanged by Torrens titles guaranteed by the respective Governments.

It might be advisable for the Legislature of Manitoba to declare all old system lands to be under the Torrens system and appoint more Torrens examiners who would proceed to issue titles to whomsoever is entitled to them after examination of the records and compulsory interrogatories of the occupants and apparent owners, including the last recorded owners or their respective heirs.

However, this is a difficult question which no doubt could be solved by a general study of titles. The fees for examining such titles could be borne equally by the Government and the title-holder and his share of the costs might be made a lien upon the land as special taxes.

Even if this particular reform were not introduced in Manitoba the respective Torrens Act, of the three provinces could be made identical in the manner suggested hereinafter.

With regards to personal property, uniformity is still more desirable. Personal property is continually moving from one province to another; manufacturers and wholesalers are daily shipping goods to other provinces. Uniformity in all the provinces would be a great advantage but in the central provinces it is nearly a necessity as they enjoy exactly the same peculiar conditions.

The laws as to Bills of Sale, Chattel Mortgages, Sales of Goods are so nearly similar it would be an easy matter to make them identical. Manitoba might introduce here the Hire Receipt Act of Saskatchewan so as to enforce the registration of lien notes which are a thorn in the flesh to lawyers and laymen alike.

There might be an Act similar to the Alberta statute and to the bill presented once in Manitoba relating to the standardizing of farm implements' contracts and prohibiting any contract but on the standard model and protecting thereby the unsuspecting farmer.

Many other Acts would suggest themselves as to which legislatures in all the three provinces might legislate simultaneously with advantage, such as crop leases, seed grain advances, sales

or mortgages of growing crops and compulsory registration of the same.

As to Court procedure and practice. We have, in Manitoba, copied the Ontario Act. It seems that Alberta and Saskatchewan have been wiser in adopting the English practice. They have there a wealth of precedents of law and practice which goes on forever increasing but which are in a great measure lost to Manitoba. However it might be argued that the Ontario practice is more in conformity with needs of a new country like Canada. That may be so but it seems that the English practice is not very much different from our own and if we had to choose now between the two Judicature Acts the majority possibly of lawyers would take the English one in preference to the other.

If an agreement cannot be arrived at in adopting the English rules the Ontario rules might as well be followed strictly and some arrangement should be arrived at between Ontario and the Central Provinces whereby the procedure hereinafter mentioned might be carried through before Ontario would further change its Judicature Act once adopted by the other provinces.

There should be no question of false pride, of territorial petty jealousies between the Westerners and the Easterners in such an important matter as a uniform practice and procedure for the four provinces. The advantage of having four sets of Courts deciding cases upon one Judicature Act should not be lost on the ground alone of local prejudice.

The Surrogate Courts Act, together with the Wills Act and Succession Duty Acts, might with advantageal so be made identical in the three provinces. And no doubt many other Acts could be refunded likewise but the question is how is it to be done?

Many suggestions could be made but it seems that the following plan might not be impractical.

It is well known that whilst many statutes have been minutely prepared most of the legislation in the west has been hastily thrown into the respective legislatures on account of some pressing need or some pressure made for good purposes by parties or communities directly affected. All legislatures and all parties are to blame for this kind of undigested legislation and the main

reason for it is that this western country is a country of wide-awake democracy, of rushing activity, of galloping progress, of born-in-the-night towns and we cannot wait once we see a reform is needed. The result is hasty action and hasty amendment and final complexity of laws.

We might with advantage follow somewhat the methods of the Mother Country and go slow, not necessarily as slow as they do in England, but a little slower than the pace we have been setting so far. We cannot attain perfection in a day. We cannot crowd in, without making mistakes, reforms however badly needed, into one session. As a matter of fact, we find after a session of the legislature that the most important reforms have been shelved on account of the time being taken up by lesser amendments to the law.

It is hardly fair to expect an Attorney-General or even his deputy to devote more time than they do at present upon the preparation and examination of new laws. They have other important duties which take up a necessary part of their valuable time such as criminal matters and the like subjects.

The only practical thing is to leave the examination of projected laws and amendments to the existing law to some special officer who would devote his whole time to it. The matter is important enough to warrant the slight expense, and besides that is practically the only way that uniformity of laws in the three western provinces can be secured.

Each legislature would appoint a law clerk who whilst connected with the Attorney-General's Department would have no duties but those mapped out hereunder.

Such law clerk would be chosen amongst the most studious and painstaking lawyers, not necessarily the most brilliant at court. The salary should be high so as to be attractive. The position should be independent of politics and practically permanent like a judgeship. He would devote his whole time to the reading of the laws of the world, acquainting himself with the most advanced legislation and compiling it for reference and preparing new laws and amendments to existing laws.

He would be assisted at the beginning when refunding the

present laws and making them identical in all the western provinces by one or more judges. The three law clerks together with the three Attorneys-General or their respective representatives would form a board which would meet once or oftener a year. The board and each law clerk would court suggestions and judges should be asked to report to the local members of the board all points of law coming up to their notice as to which legislation appears desirable.

The board's decision could not of course be binding on the legislatures but each Attorney-General would agree not to bring any legislation upon general matters without first submitting it to the board.

The private members could, strictly speaking, carry through some independant legislation but the suggestion by the Attorney-General that it be first referred to the board would commend itself to the members at large and the private sponsor of the proposed bill would get scant support.

The legislature would not divest itself of its supreme powers as it could reject any law proposed by the board but with the assistance of the Attorneys-General the board's decisions would go through.

Winnipeg. ALBERT DUBUC.

THE HOUSE AND FAMILY OF WINDSOR.

The change in the family name of the Sovereign of the British Empire is of more than passing interest. The explanatory statement of the *Times* and the King's proclamation are worthy of perusal and of record. The article from the *Times* is as follows:—

"The step formally taken on Tuesday, July 17, by the King in Council will give unqualified satisfaction throughout the British Dominions. He has abolished all German titles and dignities in the Royal Family and assumed the family name of Windsor. This is a more democratic step than is apparent on the surface. It means that the male descendants of the Sovereign will be commoners in the third generation, with a courtesy title as the sons of Dukes, and plain Mr. Windsor in the fourth generation. The assumption of a family name is a necessary corollary

of the recently announced abolition of princely titles for the younger generations in descent from the Sovereign, and no better choice could have been made than that of Windsor. It connects the old with the new. The fame of Windsor goes back to Saxon times, and the Castle has been closely associated with the successive Royal Houses of England. Plantagenets were born there; Tudors and Stuarts were buried there; Hanoverians died there; Queen Victoria, King Edward VII., and King George's brother, who would have been King had he lived, are buried there. There is an ample and unbroken tradition with this old Kingdom of England, "blazoned in Shakespeare's purple page," as an American poet has finely said. And Windsor is a lodestar for the descendants of those who have gone forth from these islands and have made the new British Empire. Visitors who "come home" from the Dominion want to see Windsor, and make their pilgrimage there. It is an appropriate and significant fact that representatives of the Dominions were present at Tuesday's historical Privy Council at which the King assumed the name of Windsor for his House and Family. Cynics may regard the change as a matter of no importance, but they are mistaken. His Majesty has been better advised. It is not wisdom, but folly, to ignore the influence of sentiment in the populace. More than anything else it binds the Empire together, and the war has demonstrated the strength of the bond by proofs which no man can gainsay or belittle. The King has known well how to gratify the patriotic sentiment of all the British peoples which centres in the Crown, in this as in other things. During the earlier part of Queen Victoria's reign, after her marriage, the German element at court was a standing cause of irritation among the mass of the people in this country, as everyone who knows them is well aware. Later the feeling, once acute, abated, and during King Edward's reign it died down. It was not a personal feeling against members of the Royal Family, who were, and are, popular, but due to an instinctive dislike of Teutonism; and who shall say now that it was not justified? By his last act King George has expunged the memory of it, and therein he has done wisely."

The following is the text of the Proclamation:—

"By the King.

A PROCLAMATION.

Declaring that the name of Windsor is to be borne by His Royal House and Family and relinquishing the use of all German titles and dignities.

George R. I.

Whereas We, having taken into consideration the Name and Title of Our Royal House and Family, have determined that henceforth Our House and Family shall be styled and known as the House and Family of Windsor:

And whereas We have further determined for Ourselves and for and on behalf of Our descendants and all other the descendants of Our Grandmother Queen Victoria of blessed and glorious memory to relinquish and discontinue the use of all German Titles and Dignities:

And whereas We have declared these Our determinations in Our Privy Council:

Now, therefore, We, out of Our Royal Will and Authority, do hereby declare and announce that as from the date of this Our Royal Proclamation Our House and Family shall be styled and known as the House and Family of Windsor, and that all the descendants in the male line of Our said Grandmother Queen Victoria who are subjects of these Realms, other than female descendants who may marry or may have married, shall bear the said Name of Windsor:

And do hereby further declare and announce that We for Ourselves and for and on behalf of Our descendants and all other the descendants of Our said Grandmother Queen Victoria who are subjects of these Realms, relinquish and enjoin the discontinuance of the use of the Degrees, Styles, Dignities, Titles and Honours of Dukes and Duchesses of Saxony and Princes and Princesses of Saxe-Coburg and Gotha, and all other German Degrees, Styles, Dignities, Titles, Honours and Appellations to Us or to them heretofore belonging or appertaining.

Given at Our Court at Buckingham Palace, this seventeenth day of July, in the year of our Lord One thousand nine hundred and seventeen, and in the Eighth year of Our Reign."

God save the King.

KINGSHIP AND THE EMPIRE.

A writer in a recent number of the *Law Times* (Eng.) deals with this subject and refers to an address given by General Smuts at a Parliamentary dinner given in his honor on the 15th ultimo. General Smuts is *persona gratio* in these days, and what he says on the subject of this character will be received with the attention it deserves: it being the views of one, who, not many years ago was fighting with his compatriots for what he believed to be right in South Africa, but who wisely and patriotically accepted graciously and loyally the generous treatment of the victors in the recent war there when generous terms were given to the Commonwealth, resulting in the loyal devotion to the Empire which General Smuts and others of his race have exhibited during the present war. General Smuts, as we all know, is not only a brilliant soldier but one of the most learned of the legal profession of the present day.

The following from the *Law Times* gives the substance of his address on the occasion above referred to:—

General Smuts, who is, as everyone knows, not merely a great soldier, but one of the most erudite jurists of his generation, at the Parliamentary dinner given in his honour on the 15th inst., in the gallery of the House of Lords, made a notable contribution to the study of constitutional development of the British Empire. Dealing with "the very difficult question of future constitutional relations and readjustments within the Empire itself," he relied on a solution of these difficulties supplied by our past traditions, "our hereditary kingship." He thus expounded the position: "You cannot," he said, "make a Republic of this country. You cannot make a Republic of the British Commonwealth of Nations, because you would have to elect a President not only here in these islands, but all over the British Empire, in India, and in the Dominions. A President would be representative of all these peoples, and here I say you would be facing an absolutely insoluble problem. Let us be thankful for mercies known as kingship, but which is really not very far different from an hereditary Republic." His exposition of the true bond of union of the multi-

tude of communities of diverse tongues and races which constitute the "British Commonwealth of Nations"—our "hereditary kingship"—would, perhaps, carry with it an enhanced force if we bear in mind the limitations of the doctrine of hereditary right enunciated by Blackstone, limitations which bring our hereditary kingship into very close analogy to the Republican system owing to its inherent liability in exceptional cases to variation of the line of succession and even to change, not occasioned by a demise of the Crown, in the *personnel* of the hereditary King. "The doctrine," writes Blackstone, "of herditary right does by no means imply an indefeasible right to the throne. No man will, we think, assert this who has considered our laws, Constitution, and history without prejudice and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom—the Sovereign and both Houses of Parliament—to defeat this hereditary right, and by particular entails, limitations, and provisions to exclude the immediate heir and vest the inheritance in anyone else. This is strictly consonant to our laws and Constitution, as may be gathered from the expression, so frequently used in our statute book, of 'the King's Majesty, his heirs and successors,' in which we may observe that as the word 'heirs' necessarily implies an inheritance or hereditary right generally subsisting in the Royal person, so the word 'successors,' distinctly taken, must imply that this inheritance must sometimes be broken through, and that there may be a successor without being the heir to the King. And this is so extremely reasonable that without such a power lodged elsewhere our polity would be very defective." Blackstone still further expounds the doctrine of hereditary kingship in these countries. "The Crown," he writes, "however it may be limited or transferred, still retains its descendible quality, and becomes hereditary in the wearer in the same manner as it was before hereditary in his predecessor, unless by the rules of the limitation it is otherwise ordered and determined."

The description of "our so-called Dominions" by General Smuts as "nations almost sovereign, almost independent," was very happy and in strict consonance with constitutional practice

and usage. These Dominions may be designated "almost" sovereign although their Legislatures are non-sovereign law-making bodies and almost independent although they are theoretically amenable to the legislation of the Imperial Parliament and absolutely bound by the foreign policy of the Imperial Cabinet. Their position of independence and sovereignty for all practical purposes is due to the policy of the Imperial Government not to interfere with the action of the Dominions in their own affairs and to the complete sympathy between the Imperial Government and the Dominions in foreign affairs—a fact which has been demonstrated by the present war. "The tendency," wrote Professor Dicey so far back as 1885, "of the Imperial Government is as a matter of policy to interfere less and less with the action of the colonies whether in the way of law-making or otherwise. Colonial Acts, moreover, even when finally assented to by the Crown, are invalid if repugnant to an Act of Parliament applying to the colony. The Imperial policy, therefore, of non-intervention in the local affairs of British dependencies combines with the supreme legislative authority of the British Parliament to render encroachments by the British Parliament on the sphere of colonial legislation and by colonial Parliaments in the domain of Imperial legislation of rare occurrence."

In welcoming the system of Imperial Conferences to discuss matters concerning all parts of our Empire for the purpose of determining the true orientation of our common Imperial policy, General Smuts laid stress on the effect of such a system in securing the knowledge and control of foreign policy by the people not only of these countries, from whom such knowledge and control have hitherto been withheld, but by the peoples of the British Empire. He thus enunciated a doctrine frequently expounded in these columns. "In the overseas Dominions," he said, "they did not understand diplomatic finesse, and if our foreign policy was going to rest not only on our Cabinet here, but finally on the whole British Empire, that policy would have to be a simpler policy, a more intelligible policy, a policy which in the end would lead to less friction and to greater safety. At the same time nobody would dispute the supremacy of the Imperial Parliament. They

would always look upon the Imperial Parliament as the senior partner in the concern. The Imperial policy would always be subject to the principles laid down at such a meeting as he suggested. This would lead to greater publicity. Nations in future would want to know more about foreign affairs." On the 17th inst., two days after the delivery of General Smuts' speech, the Prime Minister announced in the House of Commons "that the holding of an annual Imperial Cabinet to discuss foreign affairs and other aspects of Imperial policy will become an accepted convention of the British Constitution." The use by the Prime Minister in this connection of the term "convention of the British Constitution" in relation to the establishment of an institution which he said "grew not by design, but out of the necessities of the war," reminds us that the British Constitution is, in the words of Lord Courtney of Penwith, "a living and a changing organism." By the side of our written law there has grown up an unwritten or conventional Constitution. The work, as Professor Freeman maintains, of legislation, of strictly constitutional legislation, has never ceased, but there has also been a series of political changes of no less moment than those recorded in the statute-book which have been made without any legislative enactment whatever.

NOTES FROM THE ENGLISH INNS OF COURT.

Criminals and the War.

The great war has undoubtedly affected all classes of the community in these islands. Those members of the Bar who practice in the criminal courts have been heard to deplore its consequences from the purely professional point of view. And with good reason. Statistics recently published have shown a remarkable falling off in crime. It is now possible to compare the years 1913, 1914 and 1915. According to the *Law Times* (June 23, 1917), the number of persons for trial at assizes and quarter-sessions in 1913 was 12,511. In 1914 it fell to 10,800; while in 1915 the figure was 6,010—less than half the pre-war figure.

In the courts of summary jurisdiction the number of persons proceeded against for indictable offences tried summarily were: 1913, 50,758; 1914, 47,759; 1915, 49,525. Other offences tried summarily being: 1913, 680,290; 1914, 626,765; 1915, 532,444. In the Court of Criminal Appeal there were 287 applications for leave to appeal in 1915 and eighty-nine appeals actually heard or otherwise disposed of, the figures for 1914 being 497 and 160 respectively. Appeals to quarter-sessions numbered 132 in 1915 as against 100 in the previous year.

These figures may possibly be explained by the fact that a large number of the unsettled members of the community are in the army, while those who are still in civil life find plenty of honest employment. It may be hoped that the change will be permanent.

Codifying the Law.

Every now and then the voice of him who would codify the law of England makes itself heard. It is possible that if the war had not supervened, some very long steps might have been taken in this direction, but since August, 1914, the time of the legislature has been very fully occupied with emergency statutes of all kinds. The necessity for this legislation supplies a partial answer to those who would place the whole law of England upon the statute book. Suppose that had been done in as complete a form a possible in 1913, would an answer to the legal conundrums which have been propounded since the war have been found in the pre-war code? The genius of a Blackstone could not have foreseen and provided for a tithe of them! There have, however, been several recent and very successful attempts to codify the law in certain of its branches. Mention may be made in this connection of the Bills of Exchange Act, 1882, the Sale of Goods Act, 1893, the Marine Insurance Act, the Merchant Shipping Act, 1894, the Forgery Act, 1909, and the Perjury Act, 1913, and lastly, the Larceny Act, 1916. Some of these measures have been, with great propriety, "lifted" from the English statute book and made part and parcel of the law in certain colonies and dependencies.

The Sale of Goods Act, 1893.

The Sale of Goods Act, 1893, is perhaps the most successful of them all—if the true measure of the success of an enactment lies in the fact that it is seldom explained or criticised in reported cases. The fact is, of course, that this particular measure embodies the condensed wisdom of whole generations of English Judges, famous alike for their knowledge of the common law and for their faculty of applying it to individual cases. The Act was drafted by His Honour Judge Chalmers, and the manner in which it took shape is best described in the preface to his work, The Sale of Goods Act, 1893 (published in 1894). He wrote: "It is difficult to know whether to call this little book a first or a second edition. It is a first edition of the Sale of Goods Act, 1893, but it is a reproduction of my book on the sale of goods, published in 1890, which was in substance a commentary on the Sale of Goods Bill. The clauses of the Bill, with a few verbal alterations, formed the large type propositions of the book. But though the language of the propositions remains the same its effect is now very different. Those propositions have become sections in the Act, and the decided cases are only law in so far as they are correct and logical deductions from the language of the Act." The great beauty of this measure is largely due to the fact that its passage through Parliament was secured by a number of distinguished lawyers, including (in the Upper Chamber) Lords Bramwell, Herschel, Halsbury and Watson, and (in the House of Commons) Sir Charles Russell and Sir Richard Webster.

Lord Brougham as Law Reformer.

Many of the great Victorian Chancellors toiled in the interests of legal reform. In 1828 Lord Brougham—or plain Mr. Brougham as he then was—moved the House of Commons that a commission should issue to enquire into the defects occasioned by time or otherwise in the laws of the realm and into the measures necessary for removing the same. His speech lasted six hours. In the course of it he exhausted a hatful of oranges, the only refreshment then tolerated by the custom of the House! According

to Mr. Atlay in his *Lives of the Victorian Chancellors*, Brougham's oration led to a greater number of legal reforms than any speech delivered either in ancient or modern times. "His concluding word," wrote his biographer, "are the noblest he ever uttered."

"It was the boast of Augustus—it formed part of the glare in which the perfidies of his earlier years were lost—that he found Rome of brick and left it of marble; a praise not unworthy a great prince, and to which the present reign also has its claims. But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence." It may be added that by a curious misprint, the *Times* in reporting this speech substituted the word "*insolvent*" for the word "*innocence*" in the last line. One may be permitted to wonder what Brougham thought of this when he read his morning paper!

An Archbishop as a Judge.

The Archbishop of Canterbury has recently for the first time been called upon to perform a duty imposed upon him by an Act passed nearly twenty years ago. The Bishop of Oxford, acting on the report of Commissioners appointed by him under the Benefices Act, 1898, to hold an enquiry into the conduct of a rector, appointed a curate of the benefice without requiring the rector to make such appointment, and inhibited the rector from performing all ecclesiastical duties of the benefice. The rector appealed to a court which, under the terms of the Act, consists of the Archbishop of the province and a judge of the High Court.

The charges and the evidence in support of them were of an extraordinary nature. It was alleged that the rector had lost influence with his people; had subordinated his duties as a priest to those of a landowner; had preached sermons which had no connection with his text or Christian doctrine; had used the pulpit as a political platform; had used bad language and been convicted of assault. Let one example suffice. On one occasion he said

in the pulpit: "My churchwardens are liars; Mr. ——— (meaning one of the churchwardens) is a liar. This was a happy company before ——— came to the parish, and it would be better for us if the ——— did not come into the church." The churchwarden who had been named rose and left the church. As he passed down the aisle the rector shouted from the pulpit: "The wicked flee and none pursueth." Of course there was a conflict of testimony, but the Judge and the Archbishop could have come to only one conclusion. They approved the order of the Bishop.

A Judge's View of a Rector's Duty.

Mr. Justice Coleridge, in language worthy of his illustrious father—whose exquisite diction earned him the *sobriquet* "silver-tongued"—said in the course of his judgment:

"With regard to his language used in the parish the evidence shows that he has an ungoverned temper. Here again we must not be too critical. Some men are slow to wrath; some have irascible tempers. Because a man is a clergyman we must not expect that he must therefore, of necessity, change his disposition. An occasional expletive, hastily uttered, and at once repented of, may be excused by human infirmity. But the habitual use of such language unfits a man to be a clergyman. It produces the worst impression, saps his influence, and encourages others, to whom he ought by his calling to show an example, to be foul-mouthed and unrestrained in their utterances. I find as a fact that the appellant is in the habit of using foul language, and in doing so, not as an unfortunate exception, but as a habit, he has been guilty of negligence. A quarrelsome disposition with his neighbours, if indulged in, and especially if accompanied by intemperate language and violent and threatening gestures, is calculated to undermine the whole influence which a clergyman should wield. I find that in several instances this has been proved by the evidence, and that in this matter he has been guilty of negligence. Finally, a clergyman should at all times be a man of peace."

The Archbishop of Canterbury, after reciting passages from the ordination service to show how the appellant had failed to be

"a wholesome example and pattern" to those among whom he was "to maintain and set forth quietness, peace and love," pronounced judgment affirming the order of the Bishop, and the appeal was dismissed.

A Case at Lambeth Palace.

Although great ecclesiastical causes are now comparatively rare, the Archbishops do occasionally exercise judicial functions in matters of ritual. In 1899 the lawfulness of the use of incense and of processional lights was referred to the Archbishops of two provinces for judgment, Dr. Temple, Archbishop of Canterbury, and Archbishop McGee, of York. They decided that the two practices were neither enjoined nor permitted by the law of the Church of England. A third question, viz., the reservation of the Blessed Sacrament, referring only to the southern province (i.e. that of Canterbury) was brought before Archbishop Temple alone, and he decided that the Church of England does not at present allow reservation in any form.

A Mild Expletive.

The hearing of this cause occupied two summer days. Mr. E. W. Hansell, known to most people as the editor of many editions of "Williams on Bankruptcy," also known to fame as an ecclesiastical lawyer, addressed the Court at great length. On the table before him there lay a huge volume from which he had been reading a passage. Upon this he had placed a glass of water which a kindly usher had provided for his refreshment. Happening, by a careless movement, to overturn the water into the black-letter book, he uttered the words "Oh! Bother." Conscious of his indiscretion, he was about to apologise to the Prelates who sat in front of him. After whispering to his colleague, Dr. Temple observed: "My brother of York agrees with me that even a stronger expletive would have been justifiable in the circumstances!"

That Former Opinion.

When preparing an argument, the advocate is sometimes confronted with a case likely to be relied on "by the other side,"

in which, on a former occasion, he successfully contended in support of a proposition which it has now become his duty to refute. But that is all in the day's work. He must needs get round it, or over it, by arguing that the former case can be distinguished; that it has since been over-ruled, or by other means. Sometimes, too, it may transpire that he himself has given an opinion contrary to that which it is now his duty to support. But recently a recognized authority on patent law, who was seeking to establish the validity of a certain patent, was a little startled when his opponent unearthed an opinion in which he had advised that the patent was worthless! "Experience has taught me that I was wrong" was his only way of getting out of a difficulty.

A Former Opinion of Lord Westbury.

Even a Judge may sometimes come against things done in his professional youth. An episode in the life of Lord Westbury—who as Attorney-General was known to fame as Sir Richard Bethell—may be mentioned in this connection. Mr. Atlay in the work above referred to (p. 259), after pointing out that the great Lord Chancellor was not always infallible either in his deduction or in his recollection, records the following incident: "I am sorry" said Lord Westbury in delivering judgment against some unfortunate trustees "profoundly sorry for the embarrassment in which these gentlemen now find themselves placed. Had they taken the most ordinary precautions, had they employed a firm of reputable solicitors, had they taken the opinion of a member of the Bar, they would never have been enmeshed in the snares which now hold them." This was a little too much for the learned counsel, whose brief contained an opinion dated some years back and signed "R. Bethell," in which his clients were advised to follow the identical course they had pursued with such disastrous consequences. "My Lord, he said there is a paper here which I am unwilling to read in open Court, but which I would beg to submit to your Lordship: "It is a mystery to me, continued the Chancellor, with unabashed countenance, when he had perused the document, how the gentleman capable of penning such an

opinion can have risen to the eminence which he now has the honour to enjoy."

Lawyers in Fiction.

Allusion was recently made in these notes to the conduct of a certain novelist who by causing real men and women, under a thin disguise, to figure in his pages came perilously near an action for libel. But which of our great writers has not drawn his pictures, or some of them, from life? Without pausing to give a complete answer to this question let us consider the case against Charles Dickens.

To establish the charge it is only necessary to study one chapter in one of his books, namely, that which contains the report of the case of "Bardell v. Pickwick." The word "charge" is only used in a Pickwickian sense; for Dickens wrote nothing that could give offence to anyone. Like a true artist, however, the man who involved Mr. Pickwick in a lawsuit obeyed the precept of Wordsworth when he wrote:

Unto the solid ground
Of Nature builds the mind that builds for aye.

BARDELL V. PICKWICK.

To begin with the judge who tried the case. He is called *Stareleigh*. Was it a mere coincidence that Mr. Justice *Gaselee* was then an ornament of the English bench? As for Serjeant Buzfuz, his speech for the plaintiff was modelled on the style of Charles Phillips who was counsel for the plaintiff in the case of *Guthrie* v. *Sterne*, an Irish case printed in 1822. But certain episodes in the Serjeant's speech are founded on fact.

CHOPS AND TOMATO SAUCE.

In the summer of 1836 a *crim. con.* action was brought by one Norton, the husband of one of the most beautiful of the Sheridan sisters, against Lord Melbourne who was then Prime Minister. Sir William Follett, who was of counsel for the plaintiff, offered certain letters in evidence against Lord Melbourne. One was in the following terms: "How are you? I shall not be able to call to-day, but probably shall to-morrow.—Yours, &c., Melbourne."

And another ran: "There is no House to-day; I will call after the levee, about four or half-past. If you wish it later let me hear from you. I will then explain to you about going to Vauxhall.—Yours, &c., Melbourne."

Sir William described these letters as "the most important the most tell-tale, the most damnatory." That they failed of their effect is proved by the fact that Lord Melbourne was triumphantly acquitted by the jury. It is now generally believed that Charles Dickens who, at that very time, was writing the Pickwick Papers modelled himself upon these letters when he made Mr. Pickwick write to Mrs. Bardell: "Garraway's twelve o'clock. Dear Mrs. B, chops and tomato sauce, Yours Pickwick," and again, "Dear Mrs. B., I shall not be at home till to-morrow. Slow coach. Don't trouble yourself about the warming pan." Who, even writing fiction, would have dared to make his imaginary counsel put forward such evidence? But Dickens was merely ridiculing what Follett had done in solemn earnest! It will be remembered that the Pickwick Papers were dedicated to Mr. Serjeant Talfourd. He was counsel for the defendant in the Norton case. It was the Serjeant who indirectly contributed the germ of the joke which so greatly entertained the friends of Mr. Peter Magnus. Serjeants junior to Thomas Noon Talfourd, whose name was last on a particular list of the members of the order, were known in the Common Pleas as "Afternoons."

Temple, June 30, 1917. W. VALENTINE BALL.

THE LAW OF ENGLAND AND CHRISTIANITY.

A judgment of far-reaching and historic importance was delivered in the House of Lords on Monday, the 14th inst. The appeal to the Lords was that of *Bowman* v. *Secular Society Limited.* The question raised was whether a bequest of residue to the respondent society, having regard to its declared objects, was good in law. The society is a company limited by guarantee, and duly registered as such under the Companies Acts. The memorandum of association defines the objects of the society, the first

of which is "(*a*) To promote, in such ways as may from time be time be determined, the principle that human conduct should be based upon human knowledge, and not upon supernatural belief; and that human welfare in this world is the proper end of all thought and action." The remaining objects, regarded separately, were admittedly (so far as they were not tainted by being merely ancillary to the first one) lawful in themselves, such as the secularisation of the State and education, the recognition of marriage as a purely civil contract, and of Sunday as a purely civil institution, and so forth. The appellants were the heir-at-law and next of kin of the testator, and their contention was that the gift of residue to the society failed on the ground that the primary object of the society involved illegality. Mr. Justice Joyce, in the Chancery Division, and Lord Cozens-Hardy, M.R., and Lords Justices Pickford and Warrington, in the Court of Appeal, had held that there was nothing necessarily illegal in the society's objects, and that therefore the bequest was valid: *Re Bowman*; *Secular Society Limited* v. *Bowman* (113 L.T. Rep. 1095; (1915) 2 Ch. 447).

The appeal was argued in January and February last, before the Lord Chancellor, Lords Dunedin, Parker of Waddington, Sumner, and Buckmaster. In the result, the Lord Chancellor alone was for allowing the appeal, the other four noble and learned Lords (Lord Dundein, after some hesitation) for dismissing it. The appeal accordingly stood dismissed, and (as was resolved on further consideration on Thursday, the 17th inst.) with costs. It was surely by the irony of fate that the House (as Lord Bowen would have said) dismissed Christianity with costs on Ascension Day—a *dies nefasta*.

The main contention of the appellants was two-fold: (1) that it is criminal to attack the Christian religion, however decent and temperate may be the form of attack; and (2) that a court will not assist in the promotion of such objects as that for which the society was formed, whether they are criminal or not.

On the first question, it now emerges as clear law from the entire final tribunal (including herein the otherwise dissentient opinion of the Lord Chancellor), that a decent and temperate

attack on the Christian religion is not criminal as blasphemy at common law, thus setting at rest any doubt which may have been felt about the striking summing up of Lord Coleridge, C.J., in *Reg* v. *Ramsay and Foote* (48 L.T. Rep. 733; 15 Cox C.C. 231; Cababé and Ellis, 126).

Lord Coleridge's ruling has held the field for thirty-four years, and was followed by Mr. Justice Phillimore in *Rex* v. *Boulter* (72 J.P. 188). Its accuracy had, however, been disputed by Sir James Fitzjames Stephen, in his writings on Criminal Law, *passim*, and more fully in the article in the *Fortnightly Review* for March 1884. To this article the late Mr. L. M. Aspland, barrister of the Middle Temple and Northern Circuit, replied in a pamphlet, "The Law of Blasphemy: being a Candid Examination of the Views of Mr. Justice Stephen" (Stevens and Haynes, 1884), which contains a full and able review of the authorities, and strongly supports Lord Coleridge's view. It is noteworthy that Mr. Aspland—a member of a well-known Unitarian family—in Appendix II. reprints two letters from Sir Samuel Romilly, written in 1817, which, curiously, contain the germ of the appellants' second contention. Thus, Sir Samuel Romilly wrote (p. 38) that legacies for propagating Unitarian or Jewish religion would not be "established" by the Court of Chancery, and (p. 39) that "there are many acts which are so illegal that courts of justice will give no countenance to them, although they do not amount to indictable offences." These letters were in explanation of his own argument for the relators in *Attorney-General* v. *Pearson* (3 Merivale, 353).

And, in truth, it was round this last point that the discussion in the recent appeal really ranged. The Court of Chancery, in the days of Lord Hardwicke and Lord Eldon, and later, certainly regarded the time-honoured dictum of Lord Hale in *Taylor's case* (Ventris, 293) that "Christianity is parcel of the laws of England," not (as Lord Sumner now regards it) as mere rhetoric, but as a definite rule of law, to be applied as occasion arose. Two comparatively modern decisions caused the principal difficulty to the society's case, and these the Court of Appeal felt bound to overrule: *Briggs* v. *Hartley* (19 L.J. 416, Ch.; 14 Jur. 683) and *Cowan* v. *Milbourn* (16 L.T. Rep. 290; L. Rep. 2 Ex. 230). They demand some examination.

In *Briggs* v. *Hartley*, Sir Lancelot Shadwell held that a legacy for the best essay on "Natural Theology," treating it as a science, and demonstrating its adequacy, when so treated, to constitute a true, perfect, and philosophical system of universal religion, was void as being inconsistent with Christianity. The Vice-Chancellor's decision was in these few words: "I cannot conceive that the bequest in the testator's will is at all consistent with Christianity, and therefore it must fail." "Not much of a judgment, that," remarked Mr. Justice Joyce when it was read to him. True, possibly; yet Mr. Justice Joyce himself brushed aside the elaborate arguments of Mr. (now Sir George) Cave, *tout court*, thus: "I do not find in the memorandum or articles of association anything subversive of morality, or contrary to law, or contravening the provisions of any statute." In the Court of Appeal, the Master of the Rolls and Lord Justice Pickford treated *Briggs* v. *Hartley* as a decision which ought not now to be followed, the latter attributing it to the doctrine as to public policy prevailing in 1850. Lord Justice Warrington, in his concurring judgment, did not deal with *Briggs* v. *Hartley*. According to the Lord Chancellor, the Court of Appeal had no sufficient ground for overruling *Briggs* v. *Hartley*. It must now be taken to be deprived of authority by the majority of the House, for, as Lord Parker pointed out, the trust there was clearly a good charity unless it could be held contrary to the policy of the law. Lord Dunedin also considers it clearly inconsistent with the opinions of the judges advising the House in the case of Lady Hewley's charities (*Shore* v. *Wilson*, 9 Cl. & F. 355, 499).

Cowan v. *Milbourn*, which the majority of the House, affirming the courts below, has declined to follow, was so strong a decision that, as the Master of the Rolls said, if it were still good law, the society could not claim the legacy. The Court of Exchequer, consisting of Lord Chief Baron Kelly and Barons Martin and Bramwell, there decided (on appeal from the Liverpool Court of Passage) that lectures maintaining that the character of Christ is defective and His teaching misleading, and that the Bible is no more inspired than any other book, involved illegality, with the result that the defendant was justified in refusing to perform

his contract to let rooms for such lectures to the plaintiff. The Chief Baron went the full length of saying that Christianity is part and parcel of the law of the land, and that, therefore, to support and maintain publicly the propositions announced could not be done without blasphemy at common law. Baron Bramwell based his judgment rather on the ground that the lectures would be unlawful under 9 & 10 Will. 3, c. 32 (commonly called the Blasphemy Act). It is true, as Lord Buckmaster pointed out, that only those persons who have been educated in or have at any time made profession of the Christian religion within the realm are within the statutory penalties (sect. 1), but (as appears from the report in 16 L.T. Rep., at p. 291) the plaintiff in *Cowan* v. *Milbourn* had stated, in answer to the recorder, that he had been educated in the Christian religion. Baron Bramwell (here echoing Sir Samuel Romilly's words) proceeded: "It is strange that there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it." This proposition seems to have proved a dark saying to the majority in the House of Lords, three of whom (Lords Dunedin, Sumner, and Buckmaster) evidently think *Cowan* v. *Milbourn* to have been wrongly decided, though Lord Parker suggested that it might possibly be supported on the footing that the lectures intended to be given would have involved vilification, ridicule, or irreverence, likely to lead to a breach of the peace.

Whatever view one may take of the result, it is impossible not to pay a tribute of respectful admiration to the Lord Chancellor's closely reasoned and vigorous dissentient opinion. Lord Finlay stands in the ancient ways. Christianity, for him, is still part of the law of the land, and that law will not help to endeavour to undermine it. For him, if the law of England is to be altered, the change must be effected, not by judicial decision, but by the act of the Legislature. According to the noble and learned Lord on the woolsack, it could never be the duty of a court of law to begin by saying what is the Spirit of the Age, and, in supposed conformity with it, to decide what the law is.—*Law Times.*

EVOLUTION OF DOCTRINE OF AGENCY IN AUTOMOBILE CASES.

Cases treating of liability of the owner of an automobile, who has purchased same for family use and pleasure, have developed what seems to be a new principle in the law of agency. A recent case by New York Court of Appeals, in which a capable adult son of the owner of an automobile was using it for his own pleasure and the owner was sued for damages caused by the son using the automobile, presents opportunity for speaking of this new principle: *Van Blarcom* v. *Dodgson,* 115 N.E. 443.

The facts shew defendant "had purchased an automobile for the pleasure of the members" of his family, consisting of his wife, married daughter, son-in-law, and an adult son. On one occasion the son, unaccompanied by any other member of the family, used the automobile for his own pleasure and "so negligently operated it as to kill plaintiff's intestate." There is no claim that the son was ignorant or generally unskillful, but he was, as a member of the family, getting pleasure therefrom as the owner intended. Was he the agent of the owner under such circumstances? If he were taking along with him another member of the family, the Court says, it might be conceded he was agent of the owner. And it then speaks as follows:—

"The proposition of liability urged in this case, however, goes further. It asserts that the father is liable for negligence in the management of his automobile by an adult son when the latter is pursuing his own exclusive ends, absolutely detached from accommodation of the family or any other member thereof. On its face a proposition seems to be self-contradictory which asserts that a person who is wholly and exclusively engaged in the prosecution of his own concerns is nevertheless engaged as agent in doing something for someone else. It has always been supposed that a person who was permitted to use a car for his own accommodation was not acting as agent for the accommodation of the owner of the car. *Reilly* v. *Connable,* 214 N.Y. 586, 108 N.E. 853, L.R.A. 1916A, 954, Ann. Cas. 1916A, 656. The

attempt is made, however, to reconcile these apparently contradictory features of this proposition by the assertion that the father had made it his business to furnish entertainment for the members of his family, and that, therefore, when he permitted one of them to use the car, even for the latter's personal and sole pleasure, such one was really carrying out the business of the parent, and the latter thus became a principal and liable for misconduct. This is an advanced proposition in the law of principal and agent, and the question which it presents really resolves itself into one whether, as a matter of common sense and practical experience, we ought to say that a parent who maintains some article for family use and occasionally permits a capable son to use it for his individual convenience ought to be regarded as having undertaken the occupation of entertaining the latter and to have made him his agent in this business, although the act being done is solely for the benefit of the son. That really is about all there is to the question. Not much can be profitably said by way of amplification or in debate of the query whether such a liability would rest upon reasonable principles, or whether it would present a case of such theoretical and attenuated agency, if any, as would be beyond the recognition of sound principles of law as they are ordinarily applied to that relation. The question largely carries on its face the answer, whichever way to be made. Unquestionably, an affirmative enswer has been given by the Courts of some States."

To this are cited a great number of cases, and then it is said: "But it seems to us that such a theory is more illusory than substantial, and that it would be far-fetched to hold that a father should become liable as principal every time he permitted a capable child to use for his personal convenience some article primarily kept for family use. That certainly would introduce into the family relationship a new rule of conduct which, so far as we are aware, has never been applied to other articles than an automobile. We have never heard it argued that a man who kept for the family use a horse or wagon or boat or set of golf

sticks had so embarked upon the occupation and business of furnishing pleasure to the members of his family that if some time he permitted one of them to use one of those articles for his personal enjoyment, the latter was engaged in carrying out, not his own purposes, but, as agent, the business of his father."

The Court goes on then to suppose that this theory owes its origin to an automobile being dangerous and an extension of the doctrine of principal is allowable.

We have set out at length the grounds upon which this Court assails the long line of cases sustaining the doctrine, and note the fact it cites no cases taking the view it advocates.

As the Court says, however, it looks like a self-contradictory proposition to say that one engaged in prosecuting his own concerns is agent for another. But does it not also look a little involved, if two members of the family were using the automobile for their pleasure, that both were agents of the owner all of the time they were using it? Did concurrence in purpose have any effect on the question of agency, or must the one driving the automobile be acting solely for the pleasure of the other?

If one acts alone for his own pleasure, this is as the owner intended, just as much as when he acts for the pleasure of another member of the family. What is there inherently contradictory in one acting as the agent for another in acting, not for himself, but in securing something for himself as one of a class? —*Central Law Journal.*

VERDICT FOR LARGER DAMAGES THAN CLAIMED.

The forms of statements of claims under the Judicature Acts conclude with a claim by the plaintiff for a sum of money as damages, but the rules make no provision for the case where the jury give a verdict for larger damages than the amount claimed. It was laid down in the early part of the last century that, when the jury gave greater damages than the plaintiff had declared for, the contradiction might be cured by entering a *remittitur* of the surplus before judgment, or the plaintiff might amend his declaration and have a new trial. A *remittitur* is not heard of in these days, nor would the privilege of amending a claim and taking a new trial be appreciated by plaintiffs. But by an ancient principle of the law of all civilised countries a judge cannot give more than the petitioner or suitor himself asks, or that which has been submitted to the judge himself on the pleadings or claims. In going beyond this, he would act beyond his jurisdiction. If, therefore, he gives more than the plaintiff seeks, his decree is ineffectual, and may be set aside. In accordance with this principle, the Exchequer Chamber in *Cheveley* v. *Morris* (2 W. Bl. 1300) reversed a judgment by default for the plaintiff as erroneous where the damages found by the jury, and for which judgment was entered up, exceeded the damages laid in the declaration. The Court refused to allow a *remittitur* to be entered, because the plaintiff had acted oppressively in suing out execution and taking the books of the defendant (who was a gentleman at the Bar) in a very insolent and invidious manner. This being the law, care had to be taken to claim a sum equal to the full amount of the debt as damages. Practitioners went further than was necessary, and it was the habit within living memory to make excessive claims which exposed the plaintiff to ridicule at the trial. The practice at the present day is more reasonable. The amount claimed is more in accordance with the facts, and an insufficient claim may be amended by the judge at the trial. Annual Practice, 1917, p. 466.—*Solicitors' Journal.*

Bench and Bar

Judicial Appointments.

Charles Percy Fullerton, of the City of Winnipeg, in the Province of Manitoba, Esquire, one of His Majesty's Counsel learned in the law for the said Province: to be a Judge of the Court of Appeal for Manitoba, in the room and stead of the Honourable A. E. Richards, deceased. (July 20.)

His Honour William S. Stewart, Judge of the County Court of the County of Queens, Prince Edward Island, to be Local Judge in Admiralty of the Exchequer Court, vice Hon. Sir William Sullivan, retired. (July 26.)

Alexander D. Mackintosh of Humboldt, Saskatchewan, Barrister-at-law, to be Judge of the District Court of the Judicial district of Battleford, Saskatchewan; vice James F. MacLean, deceased. (September 3.)

Thomas Joseph Blain of the City of Regina, Province of Saskatchewan, Barrister-at-law, to be Judge of the District Court of the Judicial District of Melville in the said Province. (September 15.)

Hugh St. Quintin Cayler of the City of Vancouver, British Columbia, Barrister-at-law, to be Judge of the County Court of Vancouver; vice W. W. B. McInnes, resigned. (September 17.)

Canadian Bar Association.

The annual meeting of this Association, which was to have been held in Winnipeg on August 29, 30 and 31 has been postponed until next year on account of the war.

Law School of Ontario.

The rumour that the School would be closed for the present, or during the continuance of the war, is unfounded. It will open as usual on September 24, with a slightly increased number of students, subject, of course, to diminution should any of them be drafted for service under the Conscription Act. The statement which has gone abroad to the effect that there will be a refund of fees to those who may be drafted is at present unauthorized.

War Notes.

LAWYERS AT THE FRONT.

Killed in Action.

Charles Bevers Scott, Lieut. 166th Battalion, Windsor, Barrister, July, 1917.

Grant Davidson Mowat, Lieut. 39th Battalion, Peterborough, First Year Student, August 15, 1917.

Military Service Act.

The following circular has been received in reference to the enforcement of the Military Service Act which has recently come into force:—

"Inquiries having been made as to the exact character of those provisions of the 'Act respecting Military Service' which relate to the prohibition of objectionable statements concerning the operation of that measure, it is deemed advisable to submit the text of the clauses of the Act containing these provisions as they appear in subsections 2 and 3 of section 16 of the Act. The subsections in question read as follows:—

"(2) Any person who by means of any written or printed communication, publication or article, or by any oral communication or by any public speech or utterence,—

"(*a*) advises or urges that men described in section 3 shall contravene this Act or regulations, or

"(*b*) wilfully resists or impedes, or attempts wilfully to resist or impede, or persuades or induces or attempts to persuade or induce any person or class of persons to resist or impede the operation or enforcement of this Act, or

"(*c*) for the purpose of resisting or impeding the enforcement or operation of this Act, persuades or induces or attempts to persuade or induce any person or class of persons to refrain from making applications for Certificates of Exemption or submitting evidence in respect thereof, shall be guilty of an offence and shall be liable upon indictment or upon summary conviction to imprisonment for a term not less than one year nor more than five years.

"(3) Any newspaper, book, periodical, phamphlet or printed publication containing matter prohibited by subsection 2 of this

section may, whether the printer or publisher thereof be previously convicted or not, be summarily suppressed and further printing or publication thereof and of any future issue of a newspaper or periodical which has contained such matter may be prohibited for any term not exceeding the duration of the present war; provided no action shall be taken under this subsection or under subsection 2 of this section without the approval of the Central Appeal Judge."

English Solicitors in the Army.

Up to the end of last year 2,570 solicitors and 1,285 articled clerks had joined the military forces, and of these 302 solicitors and 200 articled clerks had been killed. Up to the time named 180 solicitors and 38 articled clerks had been mentioned in dispatches, two had won C.B.s, eight C.M.G.s, 28 D.S.O.s, five D.C.M.s, 124 M.C.s, one the M.M., and two the Croix de Guerre. These facts were stated at the annual meeting of the Law Society recently. The Chairman also stated that out of 440 solicitors who had offered themselves for National Service, only six had been given employment.

Flotsam and Jetsam.

Insolvency Caused by War.

The English Parliament has passed a number of Acts modifying civil liabilities to meet the exigencies of war, and some similar legislation may be found necessary in this country. One of the most interesting of these measures is a provision that if a person against whom a petition in bankruptcy is presented proves that his inability to pay is due to the present war the Bankruptcy Court may stay proceedings under the petition. See *In re Silber*, [1915] 2 K.B. 317, wherein the Act was interpreted and applied. Many possible conditions can be imagined whereby a condition of war would render a solvent trader temporarily unable to meet his obligations—debts due from persons who have become alien enemies, inability to ship goods because of an enemy blockade or a government embargo, or the like. Such a person certainly should not be forced into liquidation, and a provision similar to that of the English Act might well be embodied in whatever emergency measures Congress may enact.

The Kaiser in Court.

It may not be generally known that some years ago (1856) a predecessor of the present reigning "All Highest," Frederick William IV., became a suitor in the courts of Missouri seeking to recover from the estate of a deceased postmaster a sum with which he absconded to America (*King of Prussia* v. *Kuepper's Admr.*, 22 Mo. 551). The royal plaintiff thus modestly described his status: "The plaintiff states that he is absolute monarch of the kingdom of Prussia, and as king thereof is the sole government of that country; that he is unrestrained by any constitution or law, and that his will, expressed in due form, is the only law of that country, and is the only legal power there known to exist as law." All of which is commended to the notice of those whose "consciences" revolt at the effort to prevent that type of government from gaining a world ascendancy.—*Law Notes.*

Advertising by Lawyers.

A speaker at a meeting of the Peoria Bar Association said that ninety per cent. of the people do not employ lawyers and do not know what their functions are. He recommended systematic advertising, saying that if people were properly informed as to the functions of lawyers they would consult them more freely and save themselves financial loss. There is no doubt that people in general are too reluctant to seek legal advice, and that their interests suffer greatly thereby. Most business men realize that the most valuable function a lawyer can render is to keep his client out of a lawsuit, and they seek professional aid promptly for that purpose. But with the great mass of the people it is otherwise. Not until trouble is imminent do they resort to a lawyer, to find that some simple act a year or two earlier would have avoided all the difficulty.—*Law Notes.*

Influence of the Professions.

At a recent meeting of the Chicago Bar Association, one of the speakers stirred up considerable comment by a statement that while the leadership of the bar has held its own in the last fifty years, that of the press and the pulpit has declined. The pulpit is too far outside our province to permit of its discussion. There is, however, an anecdote of a Bishop who claimed to be a greater man than a Judge because "I can say to a man 'you shall be damned' while you can but say 'you shall be hanged.'" "Yes," retorted his lordship, "but when I say to a man 'you shall be hanged' he is hanged."—*Law Times.*

Canada Law Journal.

VOL. LIII. TORONTO, OCTOBER, 1917. No. 10

INTERNATIONAL ARBITRATION VINDICATED.

Where it is remembered that the ostensible cause of the present dreadful war was the determination of Austria to be both judge and executioner in its own cause, the reply of the present Austrian Emperor to the Pope's proposals for peace reads like a naive, but none the less pregnant, condemnation of the action of his predecessor on the throne.

The murder of the Archduke Ferdinand was no doubt a grievous and inexcusable act, and a cause for which in olden times war by one monarch on another who was believed to have connived at such a deed would be considered justifiable. But in the present stage of the world's civilization the really enlightened nations of the world have arrived at the conclusion that there is a more just and reasonable method of obtaining satisfaction even for such a wrong. France, Italy, England and the United States have for years past favoured the idea that international quarrels should be submitted to arbitration, but the less advanced nations, of which Germany and Austria are conspicuous instances, have favoured the old "might is right" idea, and one of them at all events has demonstrated beyond the possibility of contradiction, that in spite of all its much vaunted Kultur it has only arrived at the position of being a nation of scientific savages.

To such nations the rough and ready methods of a barbarous age naturally approve themselves, and it is by such a people regarded as the right of the stronger nations to regard with contempt the rights of smaller nations. Servia was a little nation and Austria a big one, and to the rulers of both Germany and Austria it seemed the most proper and natural thing for the big nation to inflict such chastisement on the smaller one as it might see fit, and that it was no one else's business; and to interfere in such

a matter was nothing but a piece of international impertinence; and the suggestion that proof should be at least given of the alleged offence before some impartial tribunal was rejected. In like manner Belgium had been resolved on by the German military authorities to be the best route by which a German invasion of France could be made; the fact that it had given no cause of offence, and was in fact in no sense an enemy, went for nothing and the country was invaded and desolated and its people killed, robbed and outraged by an overwhelming force for no cause save such as the wolf alleged against the lamb whom he sought to devour.

With Austrians and Germans the mere fact that the accusation of complicity in the murder of Ferdinand was made was regarded as equivalent to proof that the charge was well founded, but even had it been so, the mere fact that some Servians had been guilty of such a deed was really no reason why all Servians should be visited with the horrors of war: and even Austrians can never have believed that all Servians, or even the majority of Servians, were implicated. Justice and humanity demanded that the accusation should first be made good before some impartial tribunal, justice also demanded that those who should be found guilty of complicity in the deed should suffer punishment in some measure commensurate with their offence. This is the course indeed which the present Austrian Emperor now practically admits is the proper one, but all these considerations proved of no avail to Francis Joseph, his predecessor. He and his fellow conspirator against the peace of Europe believed that they were ready for a fight as no other nations were, and that by rapid action they might strike down all opponents before they could properly prepare themselves to resist the onslaught. All thoughts of justice and humanity were cast to the winds in order that the bloodthirsty and cruel monsters whose selfish policy has devastated Europe might satisfy their thirst for gore.

It is therefore like the return of an insane man to reason to read the following passage from the Austrian Emperor's reply to the Pope.

"With deep-rooted conviction we agree to the leading ide

of your Holiness that the future arrangement of the world must be based on the elimination of armed forces, and on the moral force of right, and on the rule of justice and legality."

That is the principle his cruel and wicked predecessor refused to give effect to, and out of the mouth of his successor he is thus broadly and implicitly condemned. If he had listened to the eminently just advice, nay, the entreaties of his really enlightened and civilized contemporaries, and not to the selfish and designing and unscrupulous monarch who sways, and will probably prove to have destroyed, the German Empire there would have been no war.

But His Imperial Majesty goes even further and says: "Fully conscious of the importance of the promotion of peace on the method proposed by your Holiness, namely, to submit international disputes to compulsory arbitration, we are also prepared to enter into negotiations regarding this proposal." It may be observed that this proposal did not originate with the Pope. It had long before the war been the subject of discussion among the really enlightened nations of the world, but it is needless to say that among the scientific savages it found no favour.

JUDICIAL DEMEANOUR.

Nothing brings the administration of justice into greater contempt than uncalled for observations by Judges, and by the want of that judicial attitude which is appropriate to their position. It has almost become a habit with some Judges to express opinions on matters which are not before them, and for others to forget that they are Judges, and allow their temper or their feelings to get the better of them. An illustration of this occurred recently at a criminal trial in England. It appears that two boys, who were undefended, and who had pleaded guilty in a Police-court, but not guilty at the Quarter Sessions, were acquitted by the jury on the latter occasion. The Judge thereupon informed the jury that they had not found a verdict consistent with the oath of office which they had taken, and said he would report them to the Home Office. He also ordered the jury to stay for the rest of the

Sessions. A writer in one of our exchanges in commenting on this incident remarks: "Whether the verdict of the jury was right or wrong is no concern of ours, but browbeating a jury by the presiding Judge, however much he may differ from their verdict, is strongly to be deprecated. In a criminal trial it is for the jury and not for the Judge to be absolutely satisfied as to a prisoner's guilt, and incidents of this description do an incalculable amount of harm."

BRITISH WAR LEGISLATION.

Any person desirous of realizing the extent of British Emergency Legislation during the present war cannot do better than read the lecture under that title delivered at the University of California last April, which appears in the September number of the *California Law Review*, the Editor of which adds some later developments in footnotes. The lecturer very justly remarks:" If there were any need of proving that England did not provoke or desire the present war, no proof could be more conclusive than the general state of unpreparedness when the war was actually declared. The number of measures which had to be taken immediately at the outbreak of the war, though large in itself, is small as compared with the additions which experience proved to be necessary in order that the war might be prosecuted to a successful finish. The need for new measures arose, first, as the Government became aware of the insufficiency of the existing rules; and, secondly, as modern warfare brought with it the necessity of providing for new emergencies."

The lecturer refers to the condition of things under the common law and then proceeds to group the war legislation under appropriate headings such as "Organization of and supplies for the forces," "Protection of the country," "Weakening the economic power of the enemy" and "Strengthening the economic power of the Empire." The information in this article will be of much interest at the present time.

NOTES FROM THE ENGLISH INNS OF COURT.

New King's Counsel.

At the close of the summer term, the English Bar was thrown into a state of mild excitement by the announcement that certain new King's Counsel had been appointed. Robert Alderson Wright and Douglas McGarel Hogg have both been called within the Bar, together with three other gentlemen who are better known in India than in England. In making these appointments during the period of the war, the present Lord Chancellor has departed from the rule laid down by his predecessor. When it was thought that peace would be declared within a short period of time, Lord Buckmaster announced that he would not advise the King to create any more silks until the end of the war, lest the juniors who are now serving with His Majesty's Forces should be deprived of the opportunity of picking up some of the work set free. The prolongation of hostilities, however, has altered all this, and has made promotion necessary in the public interest. It was impossible to keep men like those whose names are mentioned above from reaching the forefront of the profession. It is a matter for surprise that Lord Finlay did not make his list a little longer. It is interesting to notice that prior to the recent appointments the junior of those who have seats within the Bar was Mr. William Finlay, the Lord Chancellor's only son and heir.

His Majesty's Counsel.

To look back, for a moment, to normal times, application for silk is not to be lightly made. Many a man with a flourishing junior practice has failed utterly when called within the Bar.

Occasionally a man takes silk with a view to retiring from the profession, but as a general rule it is regarded as a stepping-stone to higher things. If he practises on the equity side he must announce within a short time the name of the judge in whose Court he proposes to practise.

On the common law side a King's Counsel can accept a brief in any Court on his own circuit or in London. If he is retained

to appear at assizes on a "foreign" circuit, he must insist upon a special fee.

The Appointment of a King's Counsel.

A King's Counsel is appointed by letters patent to be "one of His Majesty's Counsel learned in the law."

The appointment rests with the Lord Chancellor, to whom the barrister desiring a silk gown makes application. There is no definite time required to elapse between "call" and the application for silk, but it is generally understood that the barrister must be of at least ten years' standing before he is appointed a King's Counsel.

The first King's Counsel was Sir Francis Bacon, who was appointed by Queen Elizabeth "Queen's Counsel Extraordinary" and received a payment by way of "pledge and fee" of £40 a year, payable half yearly. Succeeding King's Counsel received a similar payment until its abolition in 1831. There was no other appointment of a King's Counsel until 1668, when Lord Chancellor Francis North was so honoured. From 1775, King's Counsel may be said to have become a regular order. Their number was very small so late as the middle of the 19th Century (20 in 1789; 30 in 1810; 28 in 1850) but at the beginning of the 20th Century there were over 250.

Lord Finlay.

In departing from the practice of his predecessor, Lord Finlay has shown himself to be what everyone hoped and expected he would be—a strong Lord Chancellor. Appointed by a non-party Government, he has every right to assert his independence. Too often in the past has the keeper of King's Conscience been a mere party man content to do the bidding of those who gave him office. In other respects, too, has the present Lord Chancellor manifested his single mindedness. He refused office except on the terms that the Government should *not* be obliged to make him a retiring allowance of £5,000 a year. Again, as a judge, he was not afraid, in a recent case decided by the House of Lords, to differ from all his noble learned brethren, and to hold (contrary

to their views), that Christianity is part of the law of "England"—an assertion which Lord Sumner, one of his colleagues, had dismissed as mere rhetoric. Lord Finlay made no enemies when he was at the Bar; he will certainly lose no friends while he retains his seat on the Woolsack.

Appeals to the House of Lords.

A much needed reform has recently been introduced to modify the practice on appeals to the House of Lords. Formerly an appellant had a year within which to make up his mind whether he would appeal or not. This period has now been reduced to six months. Why the period was never curtailed before is one of those problems in legal practice which it is difficult to solve. An appeal is presented to the House of Lords very much as an appeal from a colonial court is presented to the Privy Council. Everything is printed; the scale of costs is enormous. Nor does it by any means follow that because all the judges of the inferior courts have decided in favour of the respondent, that the Law Lords will follow suit. In fact, the case is so presented both in print and by word of mouth to the appeal Committee that the odds seem to be against the respondent.

Uncertainty of Appeals.

In former days there was a Chancery Judge whose decisions were constantly reversed on appeal. Indeed it used to be said that "to go to the Court of Appeal with a judgment of Mr. Justice Blank in your favour was like going to sea on a Friday—dangerous but not necessarily fatal." The same thing might be said of the position of a respondent who is taken "to the Lords" in a certain type of commercial case although he has several judgments below in his favor.

In actions for breach of contract it is frequently necessary for the court to say whether there was any contract, and to ascertain its terms and conditions from letters passing between the parties. It is obvious that the advocate who has the first opportunity of reading the correspondence to the court has an

enormous advantage. He can dismiss one letter as irrelevant, read the portion of another which suits him, and surround the whole with an atmosphere favourable to his client. Of course a vigilant judge, having the letters before him, may see through the wiles of the advocate, and opposing counsel will endeavour to expose the fallacies by judicious interruption. But judges even in the House of Lords are only human. Although the letters are all printed and in front of them, they do not always read everything. Nor do they brook interruption of the counsel who is addressing them. A first impression easily formed may be difficult to dislodge. So in a case of this character he who has the first word has an enormous advantage.

The appellant can open the case in his own way. He is not called upon to read the judgments of the Courts of Appeal until his own good time; and he reads them in the appellant's atmosphere which he has himself created. The writer is to some extent talking of his own experience. He was recently concerned in a case on the above lines. It lasted three weeks in the Court of first instance and was then passed through three Courts of Appeal, the last being the House of Lords. In each case the side which had the first word came off victorious. No doubt justice was done in the long run but the moral is clear. Let not the litigant who is successful in the Court of Appeal begin to rejoice until the time within which an appeal to the Lords may be brought has passed by.

The report of the Inspector of Legal Offices for Ontario for last year has been issued. It contains matters of interest to the profession, who will be glad in this time of dearth of legal business to be reminded that the legal machine is still grinding out law, although so many of the profession have gone overseas. No class in the community has more bravely responded to the call of King and country than has the legal profession and, in proportion to their numbers, more lawyers have gone than any other class; and none have been so hard hit, not only financially but also in the sacrifices, even to the death, which they have made for their country.

REVIEW OF CURRENT ENGLISH CASES.

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ALIEN ENEMY—OUTBREAK OF WAR—PARTNERSHIP—DISSOLUTION.

Stevenson v. *Aktiengesselchaft &c.* (1917) 1 K.B. 842. This was an appeal from the decision of Atkin, J. (1916) 1 K.B. 763 (noted ante vol. 52, p. 222). The plaintiffs, and defendants, a German firm, were, prior to the outbreak of the war, carrying on business in partnership in England, and the action was brought by the plaintiffs claiming a declaration that, by reason of the war, the partnership was dissolved, and that the defendants were only entitled to such sum as might be found due to them on the date of dissolution, and that defendants were not entitled to any profits made after the declaration of war. Bray, J., held that the partnership was dissolved as of the date of the outbreak of the war, and that the provisions of the Partnership Act of 1890 were not applicable, but that the defendants were entitled to the value of their share in the partnership, including the goodwill, at the date of the dissolution, and to be paid that amount when payment became legally possible, but were not entitled to any share of profits made after the commencement of the war. The Court of Appeal (Eady & Bankes, L. JJ., and Lawrence, J.) agreed with Atkin, J., that the partnership became dissolved by the outbreak of the war, but held that the provisions of the Partnership Act as to the winding-up of a partnership were applicable in such a case and that the English partner was not entitled to purchase the enemy partner's share, or to take it himself upon paying its value, and that the enemy partner was entitled to a share of the profits made out of the partnership assets after the dissolution. Lawrence, J., however dissented on the latter point, and considered that the enemy partner was not entitled to any share of the profits accruing after the partnership had become illegal.

INSURANCE (MARINE)—VESSEL TORPEDOED—SUBSEQUENT LOSS THROUGH SINKING AT DOCK—PROXIMATE CAUSE OF LOSS.

Leyland Shipping Co. v. *Norwich Union F. I. Co.* (1917) 1 K.B. 873. In this case the Court of Appeal (Eady, Bankes and Scrutton, L.JJ.), affirming Rowlatt, J., held that where a vessel was torpedoed by a German submarine and damaged, but was towed into a port, and subsequently sank owing to the damage received,

the proximate cause of loss was the torpedoing of the vessel, and that the policy under which the plaintiffs sued having excepted "all consequences of hostilities or warlike operations," the plaintiffs' action failed.

HUSBAND AND WIFE—WIFE'S TORT ARISING OUT OF CONTRACT—MASTER AND SERVANT—EMPLOYMENT BY WIFE—DANGEROUS PREMISES—LIABILITY FOR WIFE'S TORT.

Cole v. *De Trafford* (1917) 1 K.B. 911. This was an action against husband and wife to recover damages for the alleged tort of the wife, in the following circumstances: The plaintiff was a chauffeur employed by the wife in and about her garage, and, owing to the defective condition of the garage, he sustained injuries in respect of which the action was brought. The Divisional Court (Bray and Horridge, JJ.), on appeal from a County Court Judge, held that the alleged tort arising out of the contract of the wife with the plaintiff, her husband was not liable therefor, and as against him the action must be dismissed.

MASTER AND SERVANT—DISMISSAL—ARREARS OF SALARY.

Healey v. *Societé Anonyme Française Rubastic* (1917) 1 K.B. 946. In this case the short point decided by Avory, J., was, that where a servant is dismissed by his employer for misconduct, the latter is, nevertheless, entitled to be paid the arrears of salary due to him, but not his pay for the current month in which he was dismissed.

CONTRACT—CONSTRUCTION OF RESERVOIR—TIME FIXED FOR COMPLETION—STOPPAGE OF WORKS BY MINISTER OF MUNITIONS—WHETHER CONTRACT TERMINATED OR SUSPENDED—DEFENCE OF THE REALM REGULATIONS, REG. 8A (*b*).

Metropolitan Water Board v. *Dick* (1917) 2 K.B. 1. The defendants in July 1914, contracted to construct a reservoir for the plaintiffs to be completed in six years, subject to a proviso that if, by reason of any impediment, the defendants were delayed in the completion of the work, the plaintiffs might extend the time. By the terms of the contract all plant brought on the premises by the defendants was to become the property of the plaintiffs and was to so continue until the completion of the work. The Minister of Munitions, in pursuance of the powers conferred by Defence of the Realm Regulations, Reg. 8A (*b*), ordered the defendants to cease work on the reservoir, and directed the plant

to be sold to the owners of munition factories, which was accordingly done. In these circumstances, the defendants claimed that the contract was at an end, and the plaintiffs brought the action for a declaration that it was only suspended. They also claimed that the sale of the plant was without authority, and that they were entitled to the proceeds. Bray, J., who tried the action, held that the contract was not terminated but only suspended, but on this point he was reversed by the Court of Appeal (Cozens-Hardy, M.R., and Scrutton and Warrington, L.JJ.). Bray J., also held that the power of the Minister of Munitions to order the removal of the plant under Reg. 8A (*b*), with a view to increasing the production of war material in other factories, involved a power to sell it to such other factories, and the plaintiffs were consequently not entitled to the proceeds. This question was not discussed on the appeal, and the decision of the Appellate Court on the other point is without prejudice to the rights of the parties to the proceeds of the sale.

HUSBAND AND WIFE—DISPUTES AS TO PROPERTY—MARRIED WOMEN'S PROPERTY ACT 1882 (45-46 VICT. C. 75) S. 17 — (R.S.O. C. 149, S. 70)—REFERENCE TO REFEREE FOR TRIAL.

Re Humphrey (1917) 2 K.B. 72. An originating summons was issued under the Married Women's Property Act 1882, s. 17 (R.S.O. c. 149, s. 70), for the purpose of determining certain questions in dispute as to property, arising between husband and wife. Ridley, J., on the return of the summons, referred the whole question for trial before a Referee. The Court of Appeal (Lord Cozens-Hardy, M.R., and Scrutton, L.J.) held that in so doing he had exceeded his jurisdiction, as the Act contemplated that the judge himself should decide such questions, and gave him no power to delegate that duty to any other tribunal.

CHARTERPARTY—REQUISITION OF SHIP BY ADMIRALTY—TERMINATION OF CONTRACT.

Anglo Northern Trading Co. v. *Emlyn Jones* (1917) 2 K.B. 78. In this case Bailhache, J., held, on a case stated by an arbitrator, that a time charterparty is put an end to, where the vessel in question is requisitioned by the Admiralty.

PRINCIPAL AND AGENT—TRAVELLER—RIGHT TO COMMISSION AFTER AGENCY DETERMINED—CONTRACT.

Marshall v. *Glanvill* (1917) 2 K.B. 87. In this case the defendants engaged the plaintiff as a traveller for the sale of their

goods in a certain district and his remuneration was to be a commission of 7½ per cent. on the net amount of trade. The agreement was terminable on six months' notice. On July 12, the defendant joined the Royal Flying Corps. Four days later he would have been compelled to join the forces by virtue of the Military Service Act. The plaintiff contended that his joining the forces did not put an end to his contract, but merely suspended it, and that he was entitled to a commission on accounts actually opened by him, even after he had ceased to work for the defendants, but a Divisional Court (Rowlatt and McCardie, JJ.), overruling a County Court Judge, held that the defendant's enlistment put an end to the contract, and that thereafter he ceased to be entitled to remuneration.

CHOSE IN ACTION—ASSIGNMENT—JUDGMENT FOR COSTS—ASSIGNMENT OF JUDGMENT FOR COSTS—COSTS TAXED, BUT NOT ENTERED ON RECORD—CONSIDERATION.

Hambleton v. *Brown* (1917) 2 K.B. 93. This was an action to recover costs in the following circumstances: One Hope recovered a judgment for possession of land and for costs. After the costs were taxed, but before the amount was entered on the record, Hope by deed, made without consideration, assigned the judgment to the plaintiff, and notice in writing of the assignment was given to the defendant. The defendant contended that until the costs were entered on the record the assignment only amounted to an assignment of a future debt, therefore that the assignment was not a legal assignment, but a mere equitable assignment, and as such void for want of consideration. It was also contended that the amount of the costs was not recoverable because at the time of trial the amount had not been entered on the record. But Atkin, J., overruled all these objections but directed, as a preliminary to the entry of judgment in the plaintiff's favour, that the amount of the costs should be entered on the record, which entry he held to be a mere ministerial act.

SHIP—ABANDONMENT OF SHIP AT SEA—SHIP AND CARGO—SUBSEQUENTLY SALVED—RIGHT TO FREIGHT.

Newsum v. *Bradley* (1917) 2 K.B. 112. The facts in this case were that a ship and cargo had been abandoned at sea, but were subsequently salved, and the simple question was, whether, in such circumstances, the shipowner was entitled to freight and Sankey, J., held that he was not.

LANDLORD AND TENANT—FURNISHED LODGINGS—IMPLIED WARRANTY AS TO FITNESS OF TENANT.

Humphreys v. *Miller* (1917) 2 K.B. 122. This was an action by a landlord to recover damages for breach of warranty, fraudulent misrepresentation and concealment, against the executors of a deceased tenant, and his medical attendant, in the following circumstances. The daughter of the deceased had engaged furnished lodgings in the plaintiff's house for her father and herself. Her father was then suffering from leprosy, which fact was not disclosed. He was attended by his doctor until his death. The jury answered, among other questions, that the daughter and doctor misrepresented that the deceased was a fit and proper person to occupy the plaintiff's rooms, and that the doctor concealed from the plaintiff that the deceased was a leper, and that he stated to the plaintiff, as agent for the deceased, that he was not suffering from any infectious disease, and they found a verdict for the plaintiff for £250; but Darling, J., who tried the action, held that there was no implied warranty in the contract of tenancy, that the deceased was a fit and proper person to occupy the plaintiff's lodgings; and further that there was no evidence that the daughter knew that her father was suffering from leprosy, or that the doctor did more than express his honest professional opinion as to the non-infectious nature of leprosy in England. He therefore gave judgment for the defendants, which was affirmed by the Court of Appeal (Eady and Bankes, L.JJ., and Lawrence, J.)

EXHIBITION—VISITOR—RIGHT TO PHOTOGRAPH EXHIBITS.

Sports and General Press Agency v. *"Our Dogs"* (1917) 2 K.B. 125. This was an appeal from the decision of Horridge, J. (1916) 2 K.B. 880 (noted ante p. 48) and the Court of Appeal (Eady and Bankes, L.JJ., and Lush, J.) have affirmed the decision, that a visitor to an exhibition has a right to photograph exhibits, unless he is by contract prohibited from so doing.

PRINCIPAL AND AGENT—FOREIGN PRINCIPAL—LIABILITY OF AGENT—NAME OF PRINCIPAL NOT DISCLOSED—CUSTOM OF MERCHANTS—PRESUMPTION—REBUTTAL.

Miller v. *Smith* (1917) 2 K.B. 141. Where an agent made a contract on behalf of foreign principals whose names he did not disclose, it was contended in this case that by the custom of merchants the agent assumes a personal liability on the contract. But the Court of Appeal (Eady and Bankes, L.JJ., and Bray, J.)

came to the conclusion, overruling Avory, J., that assuming the custom existed, it was only applicable where the contract rendered the agent alone liable to the exclusion of the foreign principal, and that it was not applicable where by the terms of the contract in question the foreign principal was directly liable to the plaintiffs, because in such a case the custom was inconsistent with the contract.

NEGLIGENCE—DEFECT IN ROOF OF HOUSE—LOOSE CORNICE—LIABILITY OF OWNER AND OCCUPIER OF HOUSE FOR DEFECTS OCCASIONING INJURY TO THIRD PERSON—INJURY TO INVITEE BY FALL OF CORNICE.

Pritchard v. *Peto* (1917) 2 K.B. 173. This was an action to recover damages for injury sustained by the plaintiff through the alleged negligence of the defendant, in the following circumstances: The defendant was the owner and occupier of a dwelling house, and the plaintiff went to the house to collect a debt due to him from the defendant. While he was standing on the doorstep, a piece of the projecting cornice of the house fell on his head and injured him. The house was apparently in good repair, and the defendant did not know of the defect, which was due to the action of the weather upon the cement. Bailhache, J., who tried the action, held that the plaintiff was not entitled to recover in the absence of proof that the defendant knew of the defect, or ought, by the exercise of reasonable care, to have known it.

SHIP—CHARTERPARTY—DEMURRAGE—PERIOD OF DEMURRAGE NOT SPECIFIED—DETENTION OF SHIP BEYOND A REASONABLE TIME.

Inverkip S. S. Co. v. *Bunge* (1917) 2 K.B. 193. The Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.) have affirmed the decision of Sankey, J., noted ante page 138.

LANDLORD AND TENANT—POWER TO DETERMINE LEASE—CONDITION PRECEDENT—COVENANT TO REPAIR—NOTICE TO DETERMINE LEASE—BREACH OF COVENANT TO REPAIR.

Burch v. *Farrows Bank* (1917) 1 Ch. 606. This was an action by a landlord against his tenants for a declaration that the lease was still subsisting, and the case turns on whether or not the lease had been effectually determined. By a provision contained in the lease, the lessees were empowered to determine the lease at

the end of the third, seventh, or fourteenth year of the term, on giving six months' previous notice, and paying all rent, and observing all covenants; and that upon such notice the term should cease without prejudice to the remedies of either party in respect of any antecedent breach of covenant. The lease contained the usual covenant by the lessee to repair and deliver up in good and substantial repair. Under the provision in the lease the defendants gave notice six months prior to the end of the seventh year of the term of their intention to terminate the lease. At the time the notice was given the demised premises were out of repair, and the lessees commenced repairs shortly before, and completed them a few days after, the date for the determination of the lease. Neville, J., who tried the action, held that the performance of the covenant to repair was a condition precedent to giving the notice, and that the lessees being in default in respect of their covenant to repair, the notice was invalid, and the lease was still subsisting, notwithstanding the qualifying words "without prejudice, &c."

VENDOR AND PURCHASER—GROUND RENTS—CONTRACT—CONSTRUCTION — MISDESCRIPTION — RESCISSION — "MISSTATEMENT OR ERROR IN DESCRIPTION OF PREMISES."

Lee v. *Rayson* (1917) 1 Ch. 613. This was an action by a purchaser of land for a rescission of the contract on the ground of material misrepresentation as to the property agreed to be sold. By the agreement in question the vendor agreed to sell 13 freehold houses let on six leases for a term of 99 years at ground rents amounting in the aggregate to £72. One pair of houses were described as rented at one entire rent of £11:10:0. Each of the next four pairs at one rent of £11 and the last three at one rent of £16:10:0. The title shown was for 12 houses rented at £5:10:0. each; and one at £6. The contract contained a provision that if there be "any misstatement or error in the description of the premises" no compensation should be allowed, or the sale annulled. Eve, J., who tried the action, held that the property which the vendor offered to convey was substantially different from that which he had contracted to sell, and that the clause providing as to misstatements did not apply and the purchaser was entitled to a rescission of the contract, and a return of his deposit.

POWER OF APPOINTMENT—SPECIAL POWER TO APPOINT BY WILL—DONEE WITH ITALIAN DOMICILE—EXERCISE OF POWER BY UNATTESTED WILL—CONFLICT OF LAWS—WILLS ACT 1837 (1 VICT. c. 26) ss. 9, 10, 27—(R.S.O. 1914, c. 120, ss. 12, 13, 30).

In *Re Wilkinson, Butler* v. *Wilkinson* (1917) 1 Ch. 620. This

was an application by originating summons to determine the question whether or not a power had been validly exercised. The power was conferred by a marriage settlement of personal property, made in 1855, whereby the property was vested in trustees "in trust for such of the children of the marriage" as the wife by will should appoint. Prior to the death of the husband, he and his wife had been residing in Italy for twenty-four years, and the wife continued to reside there until her death in 1914. By her will made in Italy which, though unattested, was valid according to Italian law, and which had been admitted to probate in England, she expressed her desire that four of her children of the marriage who were unmarried would "have equal shares in the money that is left," naming the items of the settled property subject to the power, "and any other property which I can and have a right to dispose of." Sargant, J., who heard the application, came to the conclusion that the will in question was a valid execution of the power notwithstanding ss. 9 and 10 of the Wills Act (see R.S.O. 1914, c. 120 ss. 12 and 13), which require wills made in execution of powers to be executed in conformity with its provisions; the will in question being a legal will according to Italian law, and recognized as such by English law; and he considered that the provisions of s. 27 of the Wills Act (see R.S.O. c. 120 s. 30), in effect made any will recognized by English law (though not executed according to the Wills Act) a sufficient will for exercising a power.

COMPANY—WINDING-UP—TWO INSOLVENT COMPANIES—CROSS CLAIMS—DUTY OF EACH COMPANY TO SATISFY ITS INDEBTEDNESS BEFORE SHARING IN ASSETS OF CREDITOR COMPANY—DISTRIBUTION OF ASSETS WITHOUT REGARD TO CROSS CLAIMS.

In *Re National Life Insurance Co.* (1917) 1 Ch. 628. This was an application in liquidation proceedings in which two insolvent companies were concerned, each company being indebted to the other, the one in respect of arrears of calls, the other in respect of an account for money lent. It was established by evidence that there was no prospect of either company receiving a cash dividend in the liquidation of the other, neither of them being able to satisfy its indebtedness to the other. In these circumstances Astbury, J., made an order authorizing the liquidator of each company to distribute the assets to the other creditors of each company without regard to the claims of the creditor company.

EXCESS PROFITS DUTY—SALE OF BUSINESS—PURCHASE MONEY PAYABLE BY INSTALMENTS—"ONE-THIRD OF THE NETT PROFITS" OF EACH YEAR—DEDUCTION OF EXCESS PROFITS DUTY.

In *Re Condran, Condran* v. *Stark* (1917) 1 Ch. 639. This was a summary application to determine the meaning of a contract for the sale of a business made in April, 1914. By the contract the purchase money was to be paid in annual instalments, such instalments being equal "to one-third part of the nett profits" for the year, and the question was whether or not for the purpose of ascertaining the amount of the annual "nett profits" the excess profit duty should be deducted. Peterson, J., following *Collins* v. *Ledgwick* (1917) 1 Ch. 179, held that the duty should be first deducted.

LIMITED COMPANY—ARTICLE AUTHORIZING BOARD OF DIRECTORS TO FORFEIT SHARES FOR NON-PAYMENT OF DEBT DUE BY HOLDER—LIEN ON SHARES—ULTRA VIRES—ILLEGAL REDUCTION OF CAPITAL—CLOG ON REDEMPTION.

Hopkinson v. *Mortimer Harley & Co.* (1917) 1 Ch. 646. This was an action by the shareholder of a limited company for a declaration that an article of the defendant company authorizing the board of directors to forfeit the shares held by debtors of the company in default of payment of their debts was invalid. Eve, J., who tried the action, held that the article in question was invalid, and *ultra vires* of the company, in that it might, if carried out, lead to an illegal reduction of the capital of the company, and moreover was in effect a clog on the redemption, assuming that the company might properly create a charge on its shares for debts due by the company to the holders thereof. He concedes it to be legal to forfeit shares for non-payment of calls, but he considers there is a difference where forfeiture is imposed for non-payment of other debts due to the company. It must be confessed that there seems to be some need for elucidating what a company can, and cannot do, in the way of forfeiting, or accepting a surrender of its own shares, and whether or not it can properly resell shares once forfeited or surrendered.

COMPANY—DEBENTURES—NO PLACE FIXED FOR PAYMENT—DEATH OF DEBENTURE HOLDER—DELAY IN REGISTRATION OF PROBATE—NO LEGAL TENDER—INTEREST—DUTY OF DEBTOR TO SEEK HIS CREDITOR.

Fowler v. *Midland* (1917) 1 Ch. 656. The Court of Appeal (Lord Cozens-Hardy, M.R., and Bankes, and Warrington, L.JJ.),

have affirmed the decision of Eve, J. (1917) 1 Ch. 527 (noted ante p. 267).

TRADE NAME—SIMILARITY—PROBABILITY OF CONFUSION—INJUNCTION.

Ewing v. *Buttercup Margarine Co.* (1917) 2 Ch. 1. The plaintiff carried on a large provision business, and had 150 shops where he sold butter, margarine, eggs, tea, cream, and condensed milk. This business was carried on under the name of the Buttercup Dairy Company. The business was well known to the buying public, and his business was popularly known as the Buttercup Company or the Buttercup. In 1916 the defendant company was incorporated as the Buttercup Margarine Co. The action was brought for an injunction restraining the defendants from using the name "Buttercup" or any other name colourably resembling the plaintiffs' trade name. Astbury, J., who tried the action, granted the injunction, and his judgment was affirmed by the Court of Appeal (Lord Cozens-Hardy, M.R., and Bankes, and Warrington, L.JJ.)

WILL—ANNUITY—CHARGE ON REALTY—PERPETUAL ANNUITY—GENERAL POWER OF APPOINTMENT OF ANNUITY.

Townsend v. *Acroft* (1917) 2 Ch. 14. In this case a will was in question whereby a testator gave his daughter an annuity of £30 for her life, with a general power of leaving it by her will. The annuity was charged on the testator's realty. The daughter exercised the power of appointment by giving the annuity to her daughter absolutely. The question was whether the daughter took a perpetual annuity or whether it was merely for her own life. Eve, J., held that the annuity was perpetual.

CO-OWNERSHIP—ASSOCIATION TO SECURE PARTICULAR BENEFITS TO MEMBERS—OBJECTS OF ASSOCIATION SATISFIED—SURPLUS FUNDS—RIGHT TO PARTICIPATE—RESULTING TRUST—BONA VACANTIA.

Re Customs Officers' Guarantee Fund, Robson v. *Attorney-General* (1917) 2 Ch. 18. The point discussed in this case is the ownership of certain surplus funds of an association. The association in question was formed of persons engaged as Excise Officers, to provide the necessary guarantee required to be given by them for the due performance of their official duties. The continuance of the association having became no longer necessary, the question

was, who was entitled to the surplus funds of the association which were vested in trustees. They were claimed by the existing, and also by past members of the association, and also by the Crown as being in the nature of *bona vacantia*. Astbury, J., who heard the matter, came to the conclusion that the members of the association existing at the time the purposes of the trust came to an end were alone entitled to participate in the surplus in proportion to the amounts respectively contributed by them, and that neither past members, nor the Crown, had any interest in the fund.

COMPANY—MEETING—PROXIES—APPOINTMENT OF PROXIES TO BE LODGED TWO DAYS BEFORE MEETING—ADJOURNMENT OF MEETING—SUBSEQUENT LODGING OF APPOINTMENTS OF PROXIES.

McLaren v. *Thomson* (1917) 2 Ch. 41. By the articles of association of a limited company it was provided that members might vote by proxy, but that the appointment of a proxy must be deposited at the registered office of the company not less than two clear days before the day for holding the meeting at which the appointee proposed to vote. The question in this case was whether appointments of proxies deposited after the date of a meeting, but before the day to which it was adjourned, were deposited in time to enable the appointees to vote at the adjourned meeting. Astbury, J., on a motion for an injunction, held that the appointments lodged after the meeting were invalid, and were not available at the adjourned meeting, which was in law merely a continuation of the original meeting.

VENDOR AND PURCHASER—PURCHASE OF TWO LOTS—MISREPRESENTATION AS TO ONE OF TWO LOTS PURCHASED—RESCISSION—SPECIFIC PERFORMANCE.

Holliday v. *Lockwood* (1917) 2 Ch. 47. In this case the plaintiff had purchased at auction lots 2 and 3. As to lot 3 the vendor made an innocent misrepresentation, which entitled the plaintiff to a rescission of the contract as to that lot. Astbury, J., also found as a fact that, but for the misrepresentation as to lot 3, the plaintiff would not have bought lot 2. The plaintiff claimed a rescission of the contract as to lot 2, and a refund of the deposit, and the defendant counter-claimed for specific performance of the contract as to lot 2, or damages, as to this lot there was no misrepresentation. In these circumstances Astbury, J., held that the plaintiff was not entitled to rescission as to lot 2, because it

was not shown that it was known to both parties at the time of the sale, nor were circumstances shown from which the Court could properly infer that the two transactions were, to the knowledge of both parties, interdependent. But though he held that the contract as to lot 2 could not be rescinded, yet as he was satisfied that the plaintiff would not have purchased that lot without the other, he refused to grant specific performance. In the result, as it did not appear that the defendant had suffered any damages, both the action and counter-claim were dismissed without costs—the plaintiff losing his £200 deposit on lot 2.

SETTLEMENT—SPECIAL POWER OF APPOINTMENT—WILL—GENERAL BEQUEST OF PROPERTY UPON TRUST FOR OBJECTS OF POWER—GENERAL REFERENCE TO POWERS—CHARGE OF DEBTS—TRUSTEES ENTITLED TO RETAIN TRUST FUNDS—(R. S.O. c. 120, s. 30).

In re Mackenzie, Thornton v. *Huddleston* (1917) 2 Ch. 58. The principal question in this case was whether a power of appointment had been effectively exercised. A married woman, having a power by deed or will to appoint certain settled trust funds in favour of her issue, made a will whereby she did "give devise and bequeath all my property of any description including any property over which I have a power of appointment" unto trustees, upon trust for sale and conversion, and thereout to pay her debts, and to hold the residue upon trust for her daughter for life with remainder to her daughter's children at twenty-one, or marriage. The testatrix had no property of her own. The daughter was her only issue. An application by originating summons was made by the trustees of the settled funds to determine whether the power was well executed and also whether they ought to hand over the fund to the trustees of the will of the married woman. On behalf of the daughter who would be entitled to the fund absolutely in default of appointment it was contended that the will was ineffectual as an exercise of the power, because it was a gift of "my property" and the fund subject to the power was not her property; and secondly because a trust for sale or conversion was created, thirdly because the testatrix provided a narrower range of investments than that contained in the instrument creating the power; and fourthly she directed payment of her debts and funeral expenses. These facts it was claimed indicated that notwithstanding the reference to the power in the will, the testatrix did not intend to execute the special power. Neville, J., who heard the case, held that the power had been well executed, though

made in favour of trustees for the objects of the power, but that the trust for payment of debts out of the fund was ineffectual. He also held that the trustees, in whose hands the appointed fund was, ought to retain the fund subject to the appointment, and ought not to hand it over to the trustees of the will of the married woman.

SOLICITOR—TRUSTEE—CONTRACT FOR SALE OF TRUST PROPERTY—SOLICITOR ACTING FOR VENDOR AND PURCHASER—FIDUCIARY RELATIONSHIP—NON-DISCLOSURE TO CLIENT OF KNOWLEDGE AS TO VALUE—BRIBE GIVEN BY PURCHASER TO VENDOR'S AGENT—WAIVER—RESCISSION.

Moody v. *Cox* (1917) 2 Ch. 71. This was an action to set aside a contract entered into by the plaintiff with the defendants for the purchase of a house in the following circumstances: The defendants Cox and Hatt were trustees of the house in question. Hatt was a solicitor, and Cox was his managing clerk. Throughout the transaction Hatt (through Cox) acted as the plaintiff's solicitor. Cox had certain valuations of the property, previously obtained by Hatt, showing that the property was of much less value than the price the plaintiff was to give; these valuations Cox failed to disclose to the plaintiff. The plaintiff knew that the defendants were trustees, and in the course of the transaction he offered, and Cox accepted, a bribe. The defendants set up this fact, but claimed specific performance of the contract. Younger J., who tried the action, held that Hatt was bound to disclose to the plaintiff all material facts relating to the matter, and that he was not relieved of that obligation by the fact that he owed a conflicting duty to his *cestuis que trust*. But he held that the defendants, by claiming specific performance of the contract, had waived their right to repudiate it on the ground of the bribe, and, therefore, the plaintiff was not deprived of his equitable right to rescission on the ground of non-disclosure by his solicitor of material facts, and with this conclusion the Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.) agreed.

DEFENCE OF REALM—ORDER IN COUNCIL AUTHORIZING INTERNMENT OF BRITISH SUBJECT—VALIDITY OF ORDER IN COUNCIL—HABEAS CORPUS—DEFENCE OF THE REALM CONSOLIDATION ACT (5 GEO. 5, C. 8) S. 1 (1)—DEFENCE OF THE REALM REGULATIONS 1914, REG. 14 B.

Rex v. *Halliday* (1914) A.C. 260. By the Consolidated Defence of the Realm Act (5 Geo. 5 c. 8), (see Dom. Stat. 1915, p. 37);

which Act is operative in Canada, as in all other British Dominions, the King in council is empowered to make regulations for securing the public safety. In assumed pursuance of the Act an order in council was passed empowering the Secretary of State to order the internment of any person "of hostile origin or associations" where, on the recommendation of a competent naval or military authority, it appears to him expedient for securing the public safety, or defence of the realm: Reg. 14 B. Under this regulation the Secretary of State ordered the internment of one Arthur Zadig, a naturalized British subject of German birth and parentage. Zadig thereupon applied for a writ of habeas corpus, and on the hearing of the application before a Divisional Court (Lord Reading, C. J., and Lawrence, Rowlatt and Atkin, JJ.), the motion was refused, and on appeal to the Court of Appeal, (Eady, Pickford and Bankes, L.JJ.), the decision was affirmed. From this decision an appeal was had to the House of Lords (Lord Finlay, L. C., and Lords Dunedin, Atkinson, Shaw, and Wrenbury), and the decision has been affirmed, Lord Shaw dissenting. The contention of the appellant was that the regulation was *ultra vires* and not authorized by the statute, and an invasion of the liberty of the subject, but this argument did not prevail, except with Lord Shaw, who delivered what might almost be called a political harangue on what he conceives to be a gross attack upon the freedom of the people, and a revival of the methods of the Star Chamber.

DEFAMATION—LIBEL—PRIVILEGED COMMUNICATION—EXCESS OF PRIVILEGE.

Adam v. *Ward* (1917) A.C. 309. This was an appeal to the House of Lords (Lord Finlay, L. C., and Lords Loreburn, Dunedin, Atkinson, and Shaw), from the judgment of the Court of Appeal (Buckley, Pickford, and Bankes, L.JJ.) The action was for libel in the following circumstances: The plaintiff, who was formerly an officer in a cavalry regiment, and was subsequently elected a member of Parliament, in a speech in the House of Commons charged that the General commanding the brigade, of which the plaintiff's regiment had formed part, had sent confidential reports to Headquarters on officers under his command, containing wilful and deliberate misstatements. The General in question referred the matter to the Army Council, of which the defendant was secretary, and he, by its direction, wrote a letter to the General vindicating him against the charge, and containing defamatory statements about the plaintiff, and also sent a copy

of the letter to the press for publication, and it was widely published in the British Press, both in the United Kingdom, and overseas Dominions. The defendant pleaded privilege, and the House of Lords, affirming the decision of the Court of Appeal, held that the occasion was privileged, and that there was no evidence of malice, and that, having regard to the circumstances in which the charge was made by the plaintiff, the publication of the defendant's letter was not unreasonably wide, and that, in the special circumstances, the alleged defamatory statements complained of were strictly relevant to the vindication of the General, and that the whole letter was protected, though, on the question of relevancy, Lord Loreburn expressed some doubt. It may be noted that the Judge at the trial left it to the jury to say "Was the letter of a public nature?" Was the subject of the letter a matter about which it was proper for the public to know? and that the jury answered these questions in the negative; but their lordships held that these questions were for the Judge to determine, as it is for him to say whether or not the document complained of was privileged.

ONTARIO—MUNICIPAL TAXATION—ASSESSMENT OF RAILWAY BRIDGE—"RAILWAY LANDS"—ASSESSMENT ACT (R.S.O. 1914 c. 105) s. 47 (3).

Cornwall v. *Ottawa and New York Ry.* (1917) A.C. 399. This was an appeal from the decision of the Supreme Court of Canada, 52 S.C.R. 466, affirming a decision of the Appellate Division S.C.O., 34 O.L.R. 55. The question involved was as to the right of a municipality to tax certain railway companies as owners and lessees of an international railway bridge, in respect of the part of the bridge situate within the limits of the municipality. The bridge in question was one across the St. Lawrence and the soil and bed of the river, and of Cornwall Island, upon which the piers and abutments rested, were vested in the Crown in right of the Province. The Assessment Act (R.S.O. 1914 c. 195) s. 47 (3), exempts from assessment structures and other property upon "railway lands" and used exclusively for railway purposes or incidental thereto, except stations and certain other buildings. The Judicial Committee of the Privy Council, affirming the judgments of the Courts below, held that by the terms of s. 47 (3) the bridge was exempt from taxation, and that the words "railway lands" included any land occupied and used by a railway, and had no reference to the title under which the land was held.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Fitzpatrick, C.J.
Davies, Idington, Duff and Anglin, JJ.] SMITH v. DARLING. [36 D.L.R. 15.

Limitation of actions—Redemption of mortgage—Disabilities.

The disability sections of the Limitations Act (R.S.O. 1914, ch. 75), do not apply to an action to redeem a mortgage.

Faulds v. Harper, 11 Can. S.C.R. 639; 9 A.R. (Ont.) 537, referred to; 32 D.L.R. 307, 36 O.L.R. 587, reversing 9 O.W.N. 385, affirmed.

A. B. Cunningham, for appellant; *J. L. Whiting*, K.C., and *J. A. Jackson*, for respondents.

ANNOTATION ON ABOVE CASE FROM D.L.R.

1. PRIOR TO 1833.

A mortgagor's right to redeem will not be barred by lapse of time so long as he remains in possession, but it may be barred if he is out of possession. Conversely, if a mortgagee has obtained possession, his right to foreclose will not be barred by lapse of time so long as he remains in possession, but if he is out of possession his right to foreclose or to bring an action for possession may be barred by lapse of time.

In England, prior to 1833, there was no statute limiting the time within which a mortgagor out of possession might sue for redemption or within which a mortgagee out of possession might sue for foreclosure. There was, however, a statute limiting the time within which a mortgagee might bring an action for possession of the mortgaged land, for by 21 Jac. I, ch. 16, sec. 1, it was enacted that no entry should be made into any lands, but within 20 years after the right or title to the same should accrue. This statute was held to apply only to claims which were recognized in a Court of law, and to have no application to a purely equitable claim for instance that of a mortgagor to redeem after his estate in the lands had been forfeited by his default in payment of the mortgage money.

The Court of Chancery, however, applied the statute by analogy. "For where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a Court of equity acts by analogy to the Statute of Limitations, the meaning being, that where the suit in equity corresponds with an action at

law which is included in the words of the statute, a Court of equity adopts the enactment of the statute as its own rule of procedure. But, if any proceeding in equity be included within the words of the statute, there a Court of equity, like a Court of law, acts in obedience to the statute." *Knox* v. *Gye* (1872), L.R. 5 H.L. 656, Lord Westbury at p. 674.

Thus, by analogy to the statute of James, the rule became established in Chancery, as stated by Lord Hardwicke in Anon (1746), 3 Atk. 313, "that after 20 years' possession of the mortgagee, he should not be disturbed, or otherwise it would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and subject to an account; which would be a great hardship." See also *Bonney* v. *Ridgard* (1784), 1 Cox's Cases in Ch. 145, at p. 149; *Barron* v. *Martin* (1815), 19 Ves. 327. Conversely the Court of Chancery would not entertain a suit for foreclosure after the lapse of the period of 20 years which would operate as a bar to a common law action for recovery of possession of the land.

Similarly, by analogy to the statute, if the mortgagor was prevented from asserting his claim by reason of any of the impediments mentioned in the statute, namely, imprisonment, infancy, coverture, unsoundness of mind, or being beyond the seas (not having absconded), a period of 10 years after the removal of the impediment was allowed to him. A very slight act on the part of the mortgagee, acknowledging the title of the mortgagor, was sufficient to take the case out of the statute. The case was also taken out of the statute by the mortgagor's remaining in possession of part of the mortgaged lands. 2 Wh. & T., L.C. in Eq., 6th ed., pp. 1219, 1220.

2. The Statutes of 1833 and 1874.

The statute of James, so far as it was applied by analogy or otherwise to claims to real property, was superseded in England by the Real Property Limitation Act of 1833 (3 & 4 Wm. IV., ch. 27) and in Upper Canada by a similar statute of 1834 (4 Wm. IV, ch. 1). The general period of limitation stated in these statutes was 20 years, but in 1874 by 37 & 38 Vict. ch. 57 (operative from the 1st of January, 1879) the period under the English statute was reduced to 12 years, and in the same year by 38 Vict. ch. 16 (operative with some exceptions from the 1st of July, 1876) the period in Ontario was reduced to 10 years.

These statutes contain provisions specifically relating to suits for redemption but before those provisions are discussed it will be advantageous to refer to some of the provisions which affect proceedings by a mortgagee for possession or for foreclosure or sale.

3. Action to Recover Land.

The statute of 1833 contained no provision specially applicable to a suit for foreclosure *eo nomine* by a mortgagee out of possession, but they provided in general terms that no person should "make an entry" or "bring an action to recover any land" after the statutory period. This general provision, originally enacted by sec. 2 of the statute of 1833, was superseded by sec. 1 of the statute of 1874 which reduced the limitation period from 20 to 12 years, and the corresponding provision in Ontario is the Limitations Act (R.S.O. 1914, ch. 75), sec. 5, as follows:—

> 5. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.

Sec. 6 defines in detail the point of time at which in various circumstances the right to make an entry or distress or to bring an action shall be deemed to have first accrued within the meaning of sec. 5. Sec. 7 makes special provision as to the effect upon a future estate of the fact that the person entitled to the particular estate upon which the future estate is expectant is out of possession. Secs. 6 and 7 do not require further comment here.

After some conflict of opinion, it was held that a suit for foreclosure or sale was a proceeding to recover land within the meaning of the statute. *Wrixon* v. *Vize* (1842), 3 Dr. & War. 104; *Harlock* v. *Ashberry* (1882), 19 Ch.D. 539; *Fletcher* v. *Rodden* (1882), 1 O.R. 155; *Heath* v. *Pugh* (1882), 7 App. Cas. 235, 16 R.C. 389; *Trust and Loan Co.* v. *Stevenson* (1892), 20 A.R. (Ont.) 66, at 79-80.

The statute of 1833 also contained a provision (sec. 40) limiting the time within which an action might be brought to recover any sum of money secured by any mortgage or lien or otherwise charged upon or payable out of land or rent. By sec. 8 of the statute of 1874 the limitation period was reduced from 20 to 12 years. The corresponding provision in Ontario is R.S.O. 1914, ch. 75, sec. 24.

As the provision just mentioned was confined to an action to recover money, an additional and explanatory statute—7 Wm. IV., & 1 Vict., ch. 28—was passed in England "for the purpose of preserving in the mortgagee the right to make an entry and bring an ejectment to recover the lands." *Chinnery* v. *Evans* (1864), 11 H.L.C. 115, at 133. This explanatory statute was superseded by sec. 9 of the statute of 1874 (which reduced the limitation period from 20 to 12 years). The corresponding provision in Ontario is R.S.O. 1914, ch. 75, sec. 23, as follows:—

> 23. Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land, at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued.

A payment under this section must be a payment by a person liable to pay as mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, as was the receiver in the case of *Chinnery* v. *Evans* (1864), 11 H.L.C. 115, A payment of rent made by a tenant of the mortgaged property to the mortgagee pursuant to a notice by the mortgagee requiring the rent to be paid to him is not such a payment. *Harlock* v. *Ashberry* (1882), 19 Ch.D. 539. But a payment made by any person "concerned to answer the debt," or by a person who under the

mortgage contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the redemption of the mortgage, is a sufficient payment. A payment by the principal debtor was held sufficient to create a new starting point as against a surety. *Lewin* v. *Wilson* (1886), 11 App. Cas. 639, at 644, 646. So a payment is sufficient if made by a person who has become bound to the debtor to pay (*e.g.*, a transferee of the equity who is bound as between himself and the transferor to pay), notwithstanding that such transferee has himself transferred the equity to a third person. *Trust and Loan Co.* v. *Stevenson* (1892), 20 A.R. (Ont.) 66.

4. Foreclosure Gives New Starting Point.

In *Heath* v. *Pugh* (1881), 6 Q.B.D. 345, 16 R.C. 376, it was held by the Court of Appeal (Lord Selborne, A.C., Baggallay and Brett, L.JJ.) reversing the judgment of the Common Pleas Division (Lord Coleridge, C. J., and Lindley, J.), that the effect of an order of foreclosure absolute obtained by a legal mortgagee is to vest the ownership of and beneficial title to the mortgaged land for the first time in the mortgagee, so that an action, brought within 20 years next after the order of foreclosure, by the mortgagee to recover possession of the land was not barred by the Statutes of Limitations (3 & 4 Wm. IV. ch. 27 and 1 Vict. ch. 28), although more than 20 years had elapsed since the legal estate in the land had been conveyed to the mortgagee and since the last payment of principal or interest secured by the mortgage. This decision was affirmed by the House of Lords (Earl Cairns, Lord O'Hagan, Lord Blackburn and Lord Watson) *sub nomine Pugh* v. *Heath* (1882), 7 App. Cas. 235, 16 R.C. 389, and in effect is a decision that since the passing of the Judicature Acts an action for foreclosure is an action to recover land (but not an action to recover possession of land: *Wood* v. *Wheaten* (1882), 22 Ch.D. 281.)

From a theoretical point of view the correctness of the decision in *Pugh* v. *Heath* is open to question, because a suit for foreclosure was, prior to the Judicature Acts, not a proceeding *in rem* for the purpose of recovering the land but was merely a suit *in personam* brought by the mortgagee (the legal owner) for the purpose of depriving the mortgagor of the equitable right to redeem. The effect of the Judicature Acts, it is submitted, was merely to confer upon one Court the jurisdiction formerly possessed by different Courts and not to change the character of the rights which might be claimed by suit or action. The Judges of the Common Pleas Division were therefore logical in holding that the suit for foreclosure did not confer upon the mortgagee any title to the land which he did not possess before; that the action for possession was the first proceeding brought by the mortgagee to recover the land, and that as it was not brought within the statutory period, the mortgagee was barred. Practically, however, the result of such a decision was almost grotesque, as it would have deprived the mortgagee of the whole benefit of the foreclosure proceedings which had been brought to a successful conclusion in the year immediately preceding that in which the action for possession was commenced. A similar case will not often arise because the mortgagee now has the right to claim foreclosure and possession in the same action. Formerly he would have had to sue in equity for foreclosure and to bring an action at law for possession although he might have pursued his different remedies concurrently.

5. Disabilities Clause in Case of Action to Recover Land.

In the statute of 1833 the general 20-year period of limitation of entry or action was subject to an extension (in favour of a person who was under disability or some one claiming under him) for a further period of 12 years after such person ceased to be under disability or died, whichever of those two events first happened (sec. 16), provided that the entry must be made or the action brought within 40 years of the time when the right first accrued (sec. 17), and that additional time should not be allowed for the disabilities of successive claimants (sec. 18). These provisions were superseded by secs. 3, 5 and 9 of the statute of 1874 (which reduced the additional period allowed for disability from 10 to 6 years, and reduced the ultimate limitation of 40 years to 30 years), and the corresponding provisions in Ontario are R.S.O. 1914, ch. 75, secs. 40, 41 and 42, as follows:—

> 40. If at the time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent, first accrues, as herein mentioned, such person is under any of the disabilities hereinafter mentioned (that is to say) infancy, idiocy, lunacy or unsoundness of mind, then such person, or the person claiming through him, notwithstanding that the period of ten years or five years (as the case may be) hereinbefore limited has expired, may make an entry or a distress, or bring an action, to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.

The corresponding section of the English Act of 1874 (sec. 3) specifies "coverture" as one of the disabilities provided for. The Ontario statute was changed in this respect by 38 Vict., ch. 16. *Hicks* v. *Williams* (1888), 15 O.R. 228.

A disability arising after the right has accrued will not prevent the time from running. *Murray v. Watkins* (1890), 62 L.T. 796.

> 41. No entry, distress or action, shall be made or brought by any person, who, at the time at which his right to make any entry or distress, or to bring an action to recover any land or rent first accrued was under any of the disabilities hereinbefore mentioned or by any person claiming through him, but within twenty years next after the time at which such right first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such twenty years, or although the term of five years from the time at which he ceased to be under any such disability, or died, may not have expired.

If a person is under one disability when his right first accrues and then falls under another disability before the removal of the first, his right may be enforced after the removal of the second, provided it be within the ultimate limitation of 20 years. *Burrows* v. *Ellison* (1871), L.R., 6 Ex. 128.

> 42. Where any person is under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress,

or to bring an action to recover any land or rent first accrues, and departs this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the period of ten years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, first accrued or the period of five years next after the time at which such person died, shall be allowed by reason of any disability of any other person.

6. Mortgagor Out of Possession.

See 28 of the statute of 1833 contained a provision specially applicable to the case of a mortgagor being out of possession. This provision was superseded in England by sec. 7 of the statute of 1874 (reducing the limitation period from 20 to 12 years), and the corresponding provision in Ontario is R.S.O. 1914, ch. 75, sec. 20, as follows:—

20. Where a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action to redeem the mortgage, but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, has been given to the mortgagor or to some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him, and in such case no such action shall be brought, but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

7. Disabilities Clause not Applicable to Suit for Redemption.

It was held by Jessel, M.R., in *Kinsman* v. *Rouse* (1881), 17 Ch.D. 104, that the time within which a mortgagor might sue for redemption was not to be extended by reason of his being under any disability. The disabilities provision (R.S.O. 1914, ch. 75, sec. 40, *supra*) saves the right of any person "to bring an action to recover any land" if such person is under disability, but, as Jessel, M.R., pointed out, an action to redeem is not, properly speaking, "an action to recover land," and the section evidently refers to cases of ordinary ownership, where the rightful owner has been dispossessed. Sec. 20 contains no qualification of the rights of the mortgagee as against the mortgagor and there is no reason for extending the disabilities provision to the case of a mortgagor.

The same result was reached in *Forster* v. *Patterson* (1881), 17 Ch.D. 132, by Bacon, V.C., who laid emphasis on the order in which the sections are arranged. In the English statute the section relating to actions by a mortgagor *follows* the disabilities section, and Bacon, V.C., considered it clear that one is not at liberty to read into the special section relating to mortgagors, a qualification derived from an earlier and more general section. In the English statute (37 & 38 Viet., ch. 57, similar in arrangement to 3 & 4 Wm. IV., ch. 27) the matter is made more plain because the disabilities section

begins: "If at the time at which the right of any person to make an entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued as aforesaid"—thus referring back to the earlier sections. The Upper Canadian statute, 4 W. IV., ch. 1, is similar in arrangement and wording to the English statute.

In C.S.U.C. 1859, ch. 88, sec. 45, the similar expression "as hereinbefore mentioned" is used, and in R.S.O. (1877), ch. 108, sec. 43 "as aforesaid," but inasmuch as the section relating to actions by mortgagors precedes the disabilities section, the application of the latter section to the former is not excluded by the expressions quoted. In R.S.O. (1887), ch. 111, sec. 43, and R.S.O. (1897), ch. 33, sec. 43, the reference is made quite specific by the expression "as in sections 4, 5 and 6 mentioned," so that the application of the disabilities section to the redemption section is excluded, unless a suit for redemption should be held to be an "action to recover land," contrary to the opinion of Jessel, M.R., in *Kinsman* v. *Rouse*, *supra*. In 10 Edw. VII., ch. 34, sec. 40, and R.S.O. (1914), ch. 75, sec. 40, the more general expression "as herein mentioned" is substituted for the specific reference to the earlier sections, but it was held in the principal case of *Smith* v. *Darling* that no change in meaning was intended.

In *Faulds* v. *Harper*, a Divisional Court (1883, 2 O.R. 405) held that the disabilities section (R.S.O. 1877, ch. 108. sec. 43) applied to a suit for redemption, the case of *Hall* v. *Caldwell*, (1861), 7 U.C.L.J., O.S. 42, 8 U.C.L.J., O.S. 93, in the Court of Error and Appeal being followed in preference to *Kinsman* v. *Rouse*, *supra*, and *Forster* v. *Patterson*, *supra*. This decision was, however, reversed by the Court of Appeal (1884, 9 A.R. (Ont.) 537). See especially the remarks of Patterson, J.A., at pp. 554 ff. with regard to the case of *Hall* v. *Caldwell*, and with regard to the effect of the changes of wording made in the successive revisions of the statutes. On appeal to the Supreme Court of Canada the judgment of the Court of Appeal was in turn reversed (1886, 11 Can. S.C.R. 639), the decision being based chiefly on the ground that the action was virtually to impeach a purchase by a trustee for sale and that therefore the Statute of Limitations had no application. Strong, J., at p. 655, says:—

> "I think it well, however, to add that if I had to choose between the decisions in *Caldwell* v. *Hall*, and those in *Kinsman* v. *Rouse* and *Forster* v. *Patterson*, I should certainly have agreed with the learned Judges of the Divisional Court; for the reason that since the two cases in 17 Chancery Division were decided, the House of Lords has held in *Pugh* v. *Heath*, 7 App. Cas. 235, that a foreclosure suit is an action for the recovery of land. This being so it follows *à fortiori* that a redemption suit is also an action or suit for the recovery of land. And it is impossible, without doing violence to the words of the statute, to hold that the saving of disabilities does not apply to any action or suit, as well in equity as at law, for the recovery of land."

Whether an action for redemption is, or is not, an action to recover land, the dictum of Strong, J., that the disabilities clauses of the statute apply to a suit for redemption has been overruled, and the decision of the Court of Appeal in *Faulds* v. *Harper* has been followed in the principal case of *Smith* v. *Darling*.

8. NATURE OF POSSESSION REQUIRED.

Time will not run against the mortgagor so long as the possession of the mortgagee may be referred to another title and is not adverse. Thus in *Hyde* v. *Dallaway* (1843), 2 Hare 528, a person to whom property was mortgaged by the tenant for life and remainderman, after having been in possession for 6 years without any acknowledgment of the mortgagor's title, purchased the interest of the tenant for life, and then continued in possession for 20 years. It was held that such possession was not adverse during the existence of the life estate so purchased, and that the statute 3 & 4 Wm. IV., ch. 27, sec. 28, was not, therefore, a bar to a suit for redemption by the remainderman or reversioner. See also *Raffety* v. *King* (1836), 1 Keen 601.

In *Faulds* v. *Harper* (1886), 11 Can. S.C.R. 639, an action for foreclosure had been brought and a decree had been made for a sale. The lands were sold pursuant to the decree and were purchased by one Harper, who acted for and in collusion with the mortgagee. Harper then conveyed to the mortgagee, who took possession and thenceforth dealt with the lands as absolute owner. In an action to redeem it was held that as the mortgagee had been in possession not as mortgagee, but as purchaser, the Statute of Limitations did not apply. The action was virtually one to impeach a purchase by a trustee for sale, to which no Statute of Limitations was applicable. See the cases cited by Strong, J., at pp. 647 ff.

Similarly if a mortgagee sells under a power of sale according to the terms of which he is an express trustee of the surplus, the Statutes of Limitation do not apply to an action by the mortgagor to make the mortgagee account for the surplus. *Banner* v. *Beveridge* (1881), 17 Ch.D. 254; *Re Bell, Lake* v. *Bell* (1886), 34 Ch.D. 462; *Biggs* v. *Freehold Loan and Savings Co.* (1899), 26 A.R. (Ont.) 232 (a case under the Short Forms of Mortgages Act), reversed on another point, 1901, 31 Can. S.C.R. 136.

A security for money lent was expressed in the form of a conveyance to the lender on trust to sell. He entered into possession and remained in possession for more than 20 years. His devisees in trust agreed to sell the mortgaged estate for a sum exceeding the amount owing for principal, interest and costs, and conveyed it to the purchaser by a deed in which the trust for sale was recited. It was held that the security was simply a mortgage, that the Statutes of Limitations applied, that the devisees in trust sold as owners in fee and that the mortgagors had no right to the surplus of the purchase money. *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch.D. 284.

If, however, the mortgagee conveys the lands to a purchaser who goes into possession, the mortgagee may set up the possession of the purchaser in addition to his own possession, if any, as mortgagee, so as to bar the mortgagor's claim. *Bright* v. *McMurray* (1882), 1 O.R. 172.

The possession required by the statute must be the possession of one person, or of several persons claiming one from or under another by conveyance, will or descent. *Doe d. Carter* v. *Barnard* (1849), 13 Q.B. 945, at 952; *Dedford* v. *Boulton* (1878), 25 Gr. 561.

Where the solicitor of a mortgagor paid off the mortgage for his own benefit, but did not take an assignment of the mortgage, it was held that his possession was the possession of his client and that time did not run against the client. *Ward* v. *Carttar* (1865), L.R. 1 Eq. 29.

If actual possession is once obtained by a mortgagee in assertion of his legal right of entry, it need not be maintained continuously for the statutory period. *Kay* v. *Wilson* (1877), 2 A.R. (Ont.) 133. But possession obtained by the mortgagee after the lapse of the statutory period does not cause his title to revive. *Court* v. *Walsh* (1882), 1 O.R. 167.

The words "possession or receipt of the profits" in R.S.O. (1914) ch. 75, sec. 20, *supra*, seem to include the case of a mortgagee receiving rent from a tenant in possession; receipt of such rent by a mortgagee for the statutory period will, it seems, bar the mortgagor's right to redeem. *Ward* v. *Carttar* (1865), L.R. 1 Eq. 29; *Markwick* v. *Hardingham* (1880), 15 Ch.D. 339; 19 Halsbury, Laws of England, p. 149, note (*l*).

9. Possession of Part of Mortgaged Lands.

The rule which prevailed prior to 3 & 4 Wm. IV., ch. 27, that no lapse of time barred the right of the mortgagor to redeem the whole of the mortgaged lands, if he held possession of part (*Rakestraw* v. *Brewer* (1728), Sel. Cas. Ch. 55, 2 P. Wms., 511) was abolished by sec. 28 of the statute. Hence it has been held that where a mortgagee had been in possession of part of the lands for more than 20 years, the right of the mortgagor to redeem that part was barred, although he held possession of the remainder of the lands. *Kinsman* v. *Rouse* (1881), 17 Ch.D. 104.

On the other hand, if a person has only a partial interest in the equity of redemption, *e.g.*, as tenant, he has a right to pay the whole mortgage debt and receive a conveyance of the mortgaged lands, subject to the rights of redemption of other persons interested in the equity. *Martin* v. *Miles* (1884), 5 O.R. 404, at 416. This principle, that the equity of redemption is an entirety which cannot be redeemed piecemeal or proportionately, has been held to apply even where the person redeeming is entitled only to a share in the equity of redemption and the other persons interested have been barred by the Statute of Limitations. *Faulds* v. *Harper* (1883), 2 O.R. 405, at 411, 11 Can. S.C.R., at pp. 645, 656.

10. When Time Begins to Run.

R.S.O. (1914), ch. 75, sec. 20, *supra*, provides that where a mortgagee has obtained possession, the mortgagor shall not bring any action for redemption "but within 10 years next after the time at which the mortgagee obtained such possession." The opinion has been expressed that the general rule that time begins to run from the taking of possession is subject to an exception if the mortgagee takes possession before the mortgage is due. Fisher on Mortgages, 6th ed., sec. 1404, citing *Brown* v. *Cole* (1845), 14 Sim. 427, 18 R.C. 116, says: "Time will not run in the case of a common mortgage until the day of redemption has arrived; for the mortgagor cannot redeem before that day." See also *Wilson* v. *Walton* and *Kirkdale Permanent Building Society* (1903), 19 Times L.R. 408. The proposition just quoted must, however, be accepted with caution. The decision in *Brown* v. *Cole*, was to the effect that a mortgagor is not entitled to redeem before the expiration of the time limited for payment of the mortgage debt. The deduction that the statute will commence to run only from the same date appears to be based upon the assumption that the

statutory bar can commence to run only from the time when the right first arose, whereas the statute provides for the commencement from the time when the mortgagee obtained possession. *Re Metropolis and Counties, Permanent Investment Building Society, Gatfield's* case, [1911] 1 Ch. 698, at 706-7.

11. ACKNOWLEDGMENT OF TITLE.

It has already been pointed out that before the passing of 3 & 4 Wm. IV., ch. 27, a slight act or admission, even oral, on the part of the mortgagee, constituted a sufficient acknowledgment of the mortgagor's title so as to preserve his right to redeem. That statute, however, required that the acknowledgment should be in writing signed by the mortgagee or the person claiming through him. See now R.S.O. (1914), ch. 75, sec. 20, *supra*.

The statute requires that the acknowledgment should be made *to* the mortgagor or to some person claiming his estate, or to the agent of such mortgagor or person. *Re Metropolis, etc., Society, Gatfield's Case*, [1911] 1 Ch. 698 at 705.

If a mortgagor is a party to an assignment of the mortgage, this may be a sufficient acknowledgment of his title by the mortgagee. *Batchelor* v. *Middleton*, (1848), 6 Hare 75. But a mere recital of the mortgage and an assignment of it, subject to the equity of redemption, by a deed to which the mortgagor or a person claiming his estate is not a party is not sufficient. The assignee is a person claiming, not the mortgagor's estate, but the mortgagee's estate. *Lucas* v. *Dennison* (1843), 13 Sim. 584. See also *Markwick* v. *Hardingham* (1880), 15 Ch.D. 339.

If a mortgagee has entered into possession, accounts of his receipt of rents are not sufficient acknowledgment, unless they are signed by him and kept for or communicated to the mortgagor or his agent. In *Baker* v. *Welton* (1845), 14 Sim. 426, this question was raised but not decided; see Sugden, Statutes Relating to Real Property, 2nd ed., 117; *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch.D. 284. 19 Halsbury, Laws of England, 151. A letter written by the mortgagee to the mortgagor intimating that the former is willing to give an account is a sufficient acknowledgment. *Richardson* v. *Younge* (1870), L.R. 10, Eq. 275, L.R. 6 Ch. 478. But a mere admission by the mortgagee that he holds under a mortgage title is not sufficient. *Thompson* v. *Bowyer* (1863), 9 Jur. N.S. 863.

In order that the person to whom an acknowledgment is made should be the agent of the mortgagor, it is sufficient if he has acted or has been treated as such by the person making the acknowledgment. *Trulock* v. *Robey* (1841), 12 Sim. 402. Halsbury, *op. cit.*, 151. *Cf. Re Metropolis, etc., Society, Gatfield's Case*, [1911] 1 Ch. 698, at 705.

On the other hand, an acknowledgment by the agent of the mortgagee is not sufficient. *Richardson* v. *Younge* (1871), L.R. 6 Ch. at 480. But the mortgagee's acknowledgment will bind his lessee. *Ball* v. *Lord Riversdale* (1816), Beatty 550.

It has been said that an acknowledgment given by the mortgagee after the expiration of the statutory period is sufficient. *Stansfield* v. *Hobson*, 1852, 3 De G. M. & G. 620, affirming 16 Beav. 236. The correctness of this construction of the statute has, however, been questioned. *Markwick* v.

Hardingham (1880), 15 Ch.D. 339; *Sanders* v. *Sanders* (1881), 19 Ch.D. 373, at 379; *Shaw* v. *Coulter* (1905), 11 O.L.R. 630. The words "in the meantime" in the statute (R.S.O. 1914, ch. 75, sec. 20) would seem to exclude an acknowledgment given after the period has expired. Under sec. 14 (relating to the right to make an entry or distress, or bring an action to recover land or rent), it has been held that an acknowledgment given after the expiration of the statutory period is too late. *McDonald* v. *McIntosh* (1857), 8 U.C.R. 388; *Doe d. Perry* v. *Henderson* (1846), 3 U.C.R. 486.

12. Acknowledgment to or by One of Several Persons.

The statute 3 & 4 Wm. IV., ch. 27, sec. 28, contained provisions as to acknowledgments by one of several mortgagees or to one of several mortgagors. The corresponding provisions in Ontario are R.S.O. (1914), ch. 75, secs. 21 and 22, as follows:—

> 21. Where there are more mortgagors than one, or more persons than one claiming through the mortgagor or mortgagors, such acknowledgment if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons.
>
> 22. Where there are more mortgagees than one, or more persons than one claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the person or persons so signing, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him, or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons as have given such acknowledgment are entitled to a divided part of the land or rent comprised in the mortgage or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent bears to the value of the whole of the land or rent comprised in the mortgage.

The provision of sec. 22 that the acknowledgment of one of several mortgagees "shall be effectual only against the party signing the acknowledgment" is directed to the case of several mortgagees where an account taken against one will bind his interest, but not the interest of any other person. The statute has no application to the case of a mortgage to several persons jointly as trustees. In the latter case there must be an acknowledgment by all. *Richardson* v. *Younge* (1871), L.R. 6 Ch. 478.

13. Against Whom Time Runs.

It has been held that the time will run against a person entitled to the equity of redemption in remainder, although the mortgagee enters into posses-

sion and the statutory period elapses in the lifetime of the tenant for life. *Harrison* v. *Hollins* (1812), 1 S. & St. 471.

A prior mortgagee in possession acquires a title against both the mortgagor and subsequent mortgagees who are out of possession. *Samuel Johnson & Sons* v. *Brock*, [1907] 2 Ch. 533, *cf. Wakefield and Barnsley Union Bank* v. *Yates*, [1916] 1 Ch. 452.

JOHN DELATRE FALCONBRIDGE.

Book Reviews.

Rescission of Contracts: A treatise of principles governing the rescission, discharge, avoidance and dissolution of contracts. By CHARLES BRUCE MORRISON, K.C., New Zealand. Stevens & Haynes, Bell Yard, Temple Bar. 1916.

As the author says in his preface this book is an endeavour to escape the embarrassment which every practising lawyer has experienced in trying to spell out of the decided cases a definite and satisfactory set of principles to guide one in advising on breaches of contract. This laudable effort the author has carried out with much success. Some articles on this subject appeared a few years ago in *The Law Quarterly Review*.

The matters discussed may be classified under the following heads:—Rescission by act of both parties—Discharge by breach—Rescission by new agreement—Resolutive condition—Repudiation—Discharge of entire contracts and of partly executed contracts—Avoidance for misrepresentation—Mistake—Dissolution by operation of law—Restitution—Damages. The author, as a matter of convenience which will be appreciated by those who seek information from this excellent treatise, gives in an appendix the judgment in some leading cases in *ipsissima verba*.

It may be that in the present turmoil caused by the reckless lawlessness of the outlaws of Europe who claim that "might is right" there may not be much demand for this volume; but, when right prevails again and contracts again become sacred, it will, we doubt not, find a ready sale.

The Grotius Society: Problems of the War. Vol. 2. Sweet & Maxwell, Ltd., 3 Chancery Lane, London. 1917.

This volume contains the papers read before the Society (now two years old), last year. It seems scarcely worth while in these days to discuss what nations ought to do or how international law, almost a dead letter, should be enforced. One of the papers

attempts to give a definition of treason in war time. A certain Ex-Minister of Justice of this Dominion might appropriately meditate on the author's comments.

New York State Bar Association: Proceedings at the 40th annual meeting, January, 1917.

The profession is much indebted to this excellent Association for the attention given to matters professional by the leading men of that State. Those who have time to peruse its pages will find much of interest even in this country.

Political Appointments: Parliaments and the Judicial Bench in the Dominion of Canada. 1896 to 1917. By N. OMER COTE, I.S.O. (of the Department of the Interior) Ottawa, 1917.

The above volume is a continuation, up to the 30th June, 1917, of the first volume published in 1896, which covered the period from the 1st July, to the 31st December, 1895; the two volumes forming a complete record for the first half century of the Canadian Confederation: 1867 to 1917.

We have nothing but praise for this excellent publication. It is most carefully compiled and scientifically arranged. No library is complete without it. The author is a son of the late C. J. Cote, who in 1866 published a similar work covering the Union period of the Province of Canada from 1841 to 1866.

War Notes.

LAWYERS AT THE FRONT.

KILLED IN ACTION.

A. E. A. Evans (Marlatt, Warner & Evans, Winnipeg), Captain, killed in action, June 16.

R. W. Davis (Davis & Ebbels, Saskatoon, Saskatchewan), Major, died of wounds, July 10.

DATES TO BE NOTED.

We record for future reference the following important dates and incidents of special interest to Canadians in connection with the present war:—

APRIL 2.

The President of the United States, Woodrow Wilson, read his message to Congress advising that: "Congress declare the

recent course of the Imperial German Government to be in fact nothing less than war against the Government and people of the United States; that it formally accept the status of the belligerent which has thus been thrust upon it, and that it take immediate steps not only to put the country in a more thorough state of defence, but also to assert all its power and employ all its resources to bring the Government of the German Empire to terms and end the war."

The President's message was a crushing and stinging indictment of German atrocities. As the climax of these acts he referred to the submarine attacks on neutral vessels. The conclusion of his message will go down in history as a pronouncement rivaling those of his great predecessor in the Presidential chair—Abraham Lincoln, the greatest American. It was as follows:

"We shall fight for the things which we have always carried nearest our hearts—for democracy—for the right of those who submit to authority to have a voice in their own government; for the rights and liberties of small nations; for a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free. To such a task we can dedicate our lives and our fortunes, everything that we are and everything that we have, with the pride of those who know that the day has come when America is privileged to spend her blood and her might for the principles that gave her birth and happiness and peace which she has treasured. God helping her, she can do no other."

AUGUST 29.

On this day an Act respecting Military Service, being chapter 19 of 7-8 George V., was assented to, superseding for the time being the Canada Militia Act of 1904.

OCTOBER 12.

A Royal proclamation was this day promulgated calling out for active service men comprised in class 1 as described in the Military Service Act, 1917, *i.e.*: All male subjects of his Majesty resident in Canada since August 4, 1914, who have attained the age of 20 years, born not earlier than 1883, and who were on July 16, 1917, unmarried or widowers without children. The men included in this class are, with certain exceptions, deemed to be enlisted and subject to military law and placed on active service for the defence of Canada either within or without its limits.

OCTOBER 13.

The efforts of the Premier of Canada, Sir Robert Borden, to form a Union Government for the better prosecution of the war arrived on this day at a successful issue; the Government so formed being composed of an equal number of members of the two great political parties, with Sir Robert Borden as Premier. The first meeting of the new Cabinet was held the same day. The distribution of offices, as subsequently arranged, is as follows:

Premier, Secretary of State for External Affairs and President of War Committee and of Reconstruction and Development Committee—Hon. Sir Robert Borden, P.C., K.C.
President of the Council and Vice-President of War Committee—Hon. N. W. Rowell, K.C.
Secretary of State—Hon. Martin Burrell.
Minister of Justice—Hon. C. J. Doherty, K.C.
Solicitor-General—Hon. Hugh Guthrie, K.C.
Finance Minister—Sir Thomas White.
Postmaster-General—Hon. P. E. Blondin.
Leader in the Senate and Chairman Military Hospitals Commission—Sir James Lougheed, K.C.
Minister of Trade and Commerce—Sir George Foster.
Minister of Militia and Defence—Hon. S. C. Mewburn, K.C.
Minister of Militia and Defence, Overseas—Hon. Sir Edward Kemp.
Minister of Public Works—Hon. F. B. Carvell, K.C.
Minister of Railways and Canals—Hon. John D. Reid.
Minister of Customs—Hon. Arthur Sifton, K.C.
Minister of Interior—Hon. Arthur Meighen, K.C.
Minister of Marine and Fisheries and Naval Services—Hon. C. C. Ballantyne.
Minister of Inland Revenue—Hon. Albert Sevigny, K.C.
Minister of Immigration and Colonization—Hon. J. A. Calder.
Minister of Agriculture—Hon. T. A. Crerar.
Minister of Labour—Hon. Thomas W. Crothers, K.C.
Ministers without portfolio—Hon. Frank Cochrane; Hon. A. K. McLean, K.C. (*Vice-President of Reconstruction and Development Committee*) and Hon. Gideon Robertson.

A TIMELY SUGGESTION.

We have been asked to publish the following Proclamation issued by one of the greatest and best men of modern times, Abraham Lincoln, President of the United States of America, at the end of the second year of the bitter struggle between the Northern and the Southern States. It is unnecessary to enlarge upon the appropriateness of such a suggestion at a time when all the civilized nations of the earth are at war—a war which has

already lasted more than three years, and the end not yet in sight. This Proclamation was as follows:—

"Whereas, the Senate of the United States, devoutly recognizing the supreme authority and just government of Almighty God in all the affairs of men and of nations, has by a resolution requested the President to designate and set apart a day for national prayer and humiliation; and

Whereas, it is the duty of nations as well as of men to own their dependence upon the overruling power of God, to confess their sins and transgressions in humble sorrow, yet with assured hope that genuine repentance will lead to mercy and pardon, and to recognize the sublime truth, announced in the Holy Scriptures and proven by all history, that those nations only are blessed whose God is the Lord;

And, insomuch as we know that by His divine law nations, like individuals, are subjected to punishments and chastisements in this world, may we not justly fear that the awful calamity of civil war which now desolates the land may be but a punishment inflicted upon us for our presumptuous sins, to the needful end of our national reformation as a whole people? We have been the recipients of the choicest bounties of Heaven; we have been preserved these many years in peace and prosperity; we have grown in numbers, wealth, and power as no other nation has ever grown. But we have forgotten God. We have forgotten the gracious hand which preserved us in peace and multiplied and enriched and strengthened us, and we have vainly imagined, in the deceitfulness of our hearts, that all these blessings were produced by some superior wisdom and virtue of our own. Intoxicated with unbroken success, we have become too self-sufficient to feel the necessity of redeeming and preserving grace, too proud to pray to the God that made us.

It behooves us, then, to humble ourselves before the offended Power, to confess our national sins, and to pray for clemency and forgiveness.

Now, therefore, in compliance with the request, and fully concurring in the views of the Senate, I do by this my proclamation designate and set apart Thursday, the 30th day of April, 1863, as a day of national humiliation, fasting, and prayer. And I do hereby request all the people to abstain on that day from their ordinary secular pursuits, and to unite at their several places of public worship and their respective homes in keeping the day holy to the Lord and devoted to the humble discharge of the religious duties proper to that solemn occasion.

All this being done in sincerity and truth, let us then rest

humbly in the hope authorized by the Divine teachings that the united cry of the nation will be heard on high and answered with blessings no less than the pardon of our national sins and the restoration of our now divided and suffering country to its former happy condition of unity and peace.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this 30th day of March, A.D. 1863.

ABRAHAM LINCOLN."

Bench and Bar

JUDICIAL APPOINTMENTS.

Daniel McNeil, of the Town of Inverness, in the Province of Nova Scotia, K.C.: to be Judge of the County Court, District Number Six, comprising the Counties of Inverness, Antigonish and Guysborough, in the said Province, vice His Honour Judge McGillivray, deceased (Sept. 17).

James McNairn Hall, of the Town of Haileybury, in the Province of Ontario, Barrister-at-Law: to be a Junior Judge of the District Court of the Provisional Judicial District of Algoma, in the said Province of Ontario (Oct. 4).

Evan Hamilton McLean, of the Town of Bowmanville, in the Province of Ontario, Esquire, Barrister-at-law, to be Junior Judge of the County Court of the County of Renfrew, in the said Province. (Oct. 13.)

E. J. Hearn, of the City of Toronto, K.C., to be Junior Judge of the County Court of the County of Waterloo.

E. N. Lewis, Barrister-at-law, to be junior Judge of the County Court of the County of Huron.

APPOINTMENTS TO OFFICE.

Gilbert White Ganong, of St. Stephen, in the Province of New Brunswick, to be Lieutenant-Governor in and over the Province of New Brunswick aforesaid, vice Hon. Josiah Wood.

Hugh Guthrie, of the City of Guelph, in the Province of Ontario, K.C., to be Solicitor-General of Canada.

Canada Law Journal.

VOL. LIII. TORONTO, NOVEMBER, 1917. No. 11

CHRISTIANITY AND THE LAW.

A learned Law Lord recently declared that the time honoured phrase, adopted by many learned judges of great eminence, that "Christianity is a part of the law of the land" is mere rhetoric.

We trust we may without presumption be permitted to point out that the unrepealed statutes of the Imperial Parliament have hitherto been usually considered, and by most lawyers are still considered to be "part of the law of the land." Among these statutes is to be found a certain Act of Parliament, 14 Car. 2, c. 4, known as the Act of Uniformity, which among other things gives a Parliamentary sanction and approval to a certain book called the Book of Common Prayer, which book among other things is a manual of the Christian religion and contains a large portion of the Gospels and Epistles, and the Catholic creeds of the Christian Church founded thereon, and also a rule of life according to Christian principles. No doubt since that law was passed the Imperial Parliament has by various subsequent statutes done away with some of the penal provisions of the Act of Uniformity, but it has never in any way repealed the formal sanction which that Act gave to the Christian religion. Moreover, the Imperial Parliament by the Lord's Day Act gave a legislative sanction to the observance of that day which the Christian Church has appointed for public worship. It has passed laws against, and imposed penalties for, the violation of the third, seventh, eighth and ninth commandments as set forth in the Book of Common Prayer. To say that "Christianity is not part of the law of England" seems to be "mere rhetoric" not founded on fact.

We agree with the Lord Chancellor that the majority of the learned Law Lords in the case referred to were not expounding the law as it existed, but practically legislating, and we may say

ignoring the existence of the Act of Parliament above referred to, and overruling former decisions of the Courts of Law and Equity founded thereon.

How far this argument may be applicable in Canada is another matter. Here we have no Act of Uniformity and no legislative adoption of the Christian religion in any form. It has been assumed by some judges that it is a part of the Common Law of England and as such became part of our law, but in the light of the recent decision of the House of Lords it is perhaps doubtful whether Christianity can be said here to be part of the law of the land as it is in England, at all events we are not able to point to an Act of the Legislature whereby the Christian religion has been formally adopted as the religion of the State.

DIVORCE IN SASKATCHEWAN AND ALBERTA.

Mr. Bram Thompson's interesting article on the subject of Divorce in Saskatchewan, which appeared in the October number of the *Canadian Law Times*, seems to deserve an answer, especially as the learned editor, no mean authority on our constitutional law, has given the article his approval.

Mr. Thompson claims that the law of divorce is part of the Common Law. If we look at the question as it stood prior to the Reformation, it will be found that marriage and divorce were within the jurisdiction of the Courts Christian, or the King's Ecclesiastical Courts, which owed their foundation to William the Conqueror, prior to whose reign the Bishop sat in the County Courts, and temporal and ecclesiastical law were administered in England by the same tribunals. When that King established the Courts Christian in England, jurisdiction in certain matters was implicitly conferred on them; among others the questions of marriage and divorce, which were regarded as matters within the sphere of the Christain religion, and therefore proper to be determined in the Courts Christian because marriage was accounted a sacrament. But when we speak of divorce it must be remembered that there were two kinds of divorce; one from bed and board

and the other an absolute dissolution of the marriage relation; but the latter kind of divorce was only granted in the English Courts Christian, where, as in the case of Henry VIII. and Catharine of Arragon, the marriage was null and void *ab initio* on the ground that the parties were at the time of the pretended marriage incompetent to enter into marriage with each other. It is therefore only in this modified sense that divorce can be said to have been part of the Common Law. The divorce *à vinculo* from any other causes than what would constitute grounds for a sentence of nullity of marriage is obviously no part of the Common Law, even assuming that Christianity is part of the law of the land, which, however, has been recently declared by a learned Law Lord to be "mere rhetoric," notwithstanding that the Act of Uniformity remains unrepealed, and the Creeds of the Christian Church are included in a schedule to that Act.

I must also demur to Mr. Thompson's describing the King's Ecclesiastical Courts as "the Court of the King as Head of the Church." They are the Ecclesiastical Courts of the King as Head of the State. The English *Law Times* has more than once drawn attention to the impropriety of describing the Sovereign as "the Head of the Church" and has again done so in a recent number (see Oct. 13, p. 375). The Royal Supremacy is a judicial and governmental Supremacy, not in any way a Spiritual Supremacy. The Sovereign is the Supreme Judge in his own Dominions because the law has definitely declared that, in the British Dominions, there shall be no "*imperium in imperio.*" He is the Supreme Judge not only of the Church of England, but of all other religious organizations in his dominions. As such he is the final judge not only of the disputes of Christian religious bodies, as many cases in the reports testify, but also of those of Jews and Mahomedans, so far as such disputes require the exercise of any coercive power. But of course he does not intervene unless his aid is invoked by one or other of the disputants.

The jurisdiction to grant absolute divorces except on grounds of nullity was not claimed or exercised by the Sovereign, or even by Parliament, until after the Reformation, and I believe that the first case in which the Parliamentary jurisdiction to dissolve a

marriage was exercised was in the case of the Marquis of Northampton.

In Burns' Ecclesiastical Law, by Phillimore (ed. 1842), p. 503, it is said: "The law of England is now in its letter and theory conformable to the ancient principle of the Roman Catholic Church, which regarded marriage as indissoluble. It was not till a century and a half afterwards* that a practice gradually crept in of dissolving marriage for infidelity by Acts of Parliament passed for each separate case."

Divorces *à vinculo* for causes other than those which warrant a sentence of nullity can therefore hardly with truth be said in sense to be a part of the Common Law, but are purely the result of statutory enactments. When Mr. Thompson says that the English Divorce Acts of 1857-8 did not enact new law, it appears to me he is mistaken. I think he also errs when he says that "the capital right to remarry formerly reposed in the King as head of the Church" was vested in the Probate and Divorce Court by those Acts, because the King was not the head of the Church, and in law, neither in that, nor in any other capacity, was the alleged right reposed in him, except only upon the theoretical idea that all English law is supposed to emanate from the Sovereign, and therefore in that sense, when Acts of Parliament dissolving marriage and permitting parties to remarry were passed, they may be said to be the Act of the Sovereign, but they are his Act not as the head of the Church, but as the head of the State.

The Acts in question did undoubtedly make new law, and gave a temporal Court jurisdiction to pronounce sentences of divorce *à vinculo* for causes for which no court, except the High Court of Parliament, had previously had any jurisdiction to dissolve marriages.

Mr. Thompson, I think, also errs in saying that on the passage of the Divorce Acts referred to, the Ecclesiastical Courts ceased to exist. They are still in existence but their jurisdiction is now confined to purely ecclesiastical matters.

When Mr. Thompson says that Colonies created before 1857

* We presume he means after the Reformation.

"were invested with the English law of divorce" it must have been the English law of divorce as it then existed, and not as it has been since developed and changed by statutes, and according to the English law prior to 1857 marriage lawfully contracted was indissoluble for any cause, and the only divorce permissible in such cases being *â mensa et thora*. Prior to 1857, as Mr. Thompson concedes, marriage and divorce were within the jurisdiction of the King's Ecclesiastical Courts in England, and no courts in Canada were created or set up prior to 1857 with any but a purely temporal jurisdiction. And it may be well to note that this does not appear to have been the result of any oversight as far as the Province of Quebec was concerned, because by the 17th section of the Quebec Act (14 Geo. 3, c. 83) it is enacted "that nothing herein contained shall extend or be construed to extend to prevent or hinder His Majesty his heirs and successors by his or their letters patent under the great seal of Great Britain from erecting constituting and appointing such courts of criminal civil and ecclesiastical jurisdiction within and for the said Province of Quebec (*which then embraced Ontario*) and appointing from time to time judges and officers thereof as His Majesty his heirs and successors shall think necessary and proper for the circumstances of the Province." The erection and constitution of Ecclesiastical Courts it is true was never carried out, but the enactment is a recognition of the then existing state of English law and its mode of administration in part by Ecclesiastical Courts. Prior to Confederation certain of the N. A. colonies enacted divorce laws, as they were competent to do, but after Confederation no Provincial Legislature has had any such power. We do not think it can properly be said that "the Matrimonial Causes Act, 1857, completely overwhelmed the pretence of the divine origin of divorce law." As I have shewn there was never any pretence that divorce law was of divine origin. According to the law of the Courts Christian, marriage lawfully contracted is undissoluble, and no divorce *â vinculo* of a properly contracted marriage could be obtained; the utmost relief was separation from bed and board. The statute referred to, as I have said, made a new law and authorized a temporal court to dissolve marriage absolutely, for

causes which the King's Ecclesiastical Courts could not dissolve marriages.

In considering the effect of Dominion and Provincial legislation, two axioms are to be remembered:

(1) All legislative power in Canada is limited by the B.N.A. Act.

(2) No legislature may make laws by reference, which it could not itself enact.

When, therefore, we come to consider the effect of the North West Territories Act (R.S.O. (1886) c. 50) s. 11, it must be remembered that the right to make laws respecting "property and civil rights" is vested exclusively in the Provincial Legislatures, and when the Dominion Parliament assumed to enact that "the laws of England relating to civil and criminal matters as the same existed on the 15th July, 1870, shall be in force in the Territories," so far as regards "civil matters" are concerned, it appears to have been exceeding the limits of its legislative powers. The 146th section of the B.N.A. Act providing for the admission of the N.W. Territories gave no jurisdiction to legislate for such Territories in civil matters and we have not come across any statute giving the Dominion Parliament that power. Mr. Thompson's argument is that the English divorce law as it existed in 1870 by s. 11 above referred to incorporated into the law of the N.W. Territories, but if "divorce" can properly be regarded as a civi matter, his argument would be untenable if, as we conceive, the Dominion Parliament had no legislative power in "civil" matters. But even if it had such power, a reasonable proper construction of the B.N.A. Act would appear to require that "divorce and marriage" shall be regarded as something separate and distinct from "civil matters" which are assigned to Provincial jurisdiction, and therefore that the Dominion Parliament by the imposition of laws concerning "civil matters" could not be held to have imposed a divorce law.

The analogy which Mr. Thompson draws between the legislation in British Columbia and that relating to Saskatchewan appears to me to fail, because the British Columbia Legislature prior to Confederation had full power to incorporate English

law in all matters, whereas the legislatures which have dealt with the matter in Saskatchewan had only limited powers; so that although the same words used by the B.C. Legislature may have been sufficient to incorporate English divorce law into the law of that Province, it does not by any means follow that the like words as regards Saskatchewan have the same effect, when the competence of the legislature to enact the law is taken into account.

For these reasons it appears to me it would be unsafe and might lead to disastrous consequences if the courts in Saskatchewan and Alberta were to assume and exercise a jurisdiction in divorce as Mr. Thompson suggests even they should.

That they could possibly legally assume any such jurisdiction without the authority of the Dominion Parliament appears to me exceedingly doubtful. Marriage and divorce being admittedly within the legislative control of the Dominion Parliament, it is for that legislature to say what courts shall exercise jurisdiction on that subject, and I should hope that if the Dominion Parliament sees fit to pass any law on the subject that such law may apply to the whole Dominion and be administered upon a uniform plan, so that we may not have the law on this important subject varying in each Province.

With regard to Mr. Thompson's strictures on the private divorce Acts of the Dominion Parliament it may be admitted that this mode of combining judicial and legislative authority is not satisfactory; nevertheless, as the Dominion Parliament has undoubtedly power to pass a general law on the subject of divorce, I fail to see how there can be any reasonable doubt of its power to pass divorce laws in specific cases, and for the purpose to make such inquiry for ascertaining the facts, as to it may seem fit as a preliminary to enacting such laws.

GEO. S. HOLMESTED.

JUDICIAL CHANGES IN ENGLAND.

Mr. Justice Ridley of the King's Bench Division has retired after a long period of judicial service. He was an Official Referee for many years before he went to the Bench. He does not seem to have been a great success as a judge. As one of our exchanges remarks: "It is perhaps unwise to promote at 55 an Official Referee whose previous career at the Bar has not given him any adequate opportunities of dealing effectually with the intricacy and subtlety of our jurisprudence as they arise during the actual hearing in court. Robert Lowe, a most successful coach and barrister, but an indifferent Chancellor of the Exchequer, sagely remarked of himself that you cannot transplant an oak at 50." Some of these observations are not inapplicable to some appointments to the Bench in other places besides England.

The two new Judges just appointed are Mr. Arthur Clavell Slater, K.C., and Mr. Alexander Adair Roche, K.C. Mr. Roche had devoted himself almost exclusively to commercial causes, whilst Mr. Slater was a great jury advocate. These appointments are highly spoken of by the Bar in England.

The new Common Sergeant is Mr. H. F. Dickens, K.C., who succeeds Sir F. A. Bosanquet. Although going on the Bench at the age of 68, his great legal knowledge, varied experience and vigour of mind and body will make him a success. His duties are to preside at the Mayor's Court and the Central Criminal Court. It is interesting to know that Mr. Dickens is a son of Charles Dickens, the novelist, famous as a writer wherever the English language is read.

CRIMINAL STATISTICS IN ANGLO-SAXON COUNTRIES.

Among the enlightened nations the United States leads the world in manumitting murders and enlarging felons, while Anglo-Saxon countries not under the American flag have the least percentage of murderers and felons.

Has any other nation laws which its courts of last resort

characterize as "a shelter to the guilty," which "has no place in the jurisprudence of civilized and free countries outside the domain of the common law and it is nowhere observed among our own people in the search of truth outside the administration of the law" or as "the privilege of crime."

Ex-President William H. Taft in his address before the Civic Forum of New York City on April 28, 1908, said:

"And now, what has been the result of the lax administration of criminal law in this country? Criminal statistics are exceedingly difficult to obtain. The number of homicides one can note from the daily newspapers, the number of lynchings and the number of executions, but the number of indictments, trials, convictions, acquittals, or mistrials it is hard to find. Since 1885 in the Unites States there have been 131,951 murders and homicides, and there have been 2,286 executions. In 1885 the number of murders was 1,808. In 1904 it has increased to 8,482. The number of executions in 1885 was 108. In 1904 it was 116. This startling increase in the number of murders and homicides as compared with the number of executions tells the story. As murder is on the increase, so are all offences of the felony class, and there can be no doubt that they will continue to increase unless the criminal laws are enforced with more certainty, more severity than they now are."

The criminal statistics referred to by ex-President Taft are those published by the Chicago *Tribune* either on New Year's Day or else on the last day of each year since 1885, showing the number of homicides and executions in the United States for each year.

The Chicago *Tribune* gives the number of homicides (including manslaughters) in the United States in 1912 as 9,152; the number of executions in 1912 as 145; it gives the number of homicides (including manslaughters) in 1913 as 8,902; the number of executions in 1913 as 88; it gives the number of homicides (and manslaughters) in 1914 as 8,251; the number of executions in 1914 (including 2 for another felony) as 74; it gives the number of homicides (and manslaughters) in 1915 as 9,230; the number of executions in 1915 (including 8 for another felony) as 119.

According to the Judicial Statistics, England and Wales, 1913, there were reported to the police of England and Wales during the year 1913, 111 murders of persons aged more than one year and 67 murders of infants of one year or less. On these 178 reported English and Welsh murders, 67 persons were brought to trial for murder; there were 28 convictions and death sentences; 16 executions; 12 commutations to penal servitude for life; 5 accused were found insane on arraignment; 17 were found guilty but insane and 17 were acquitted.

In 1913, 154 manslaughters were reported to the English and Welsh police, on which 136 persons were brought to trial, on which trials there were 63 convictions and sentences.

In 1914, the number of murders and manslaughters reported to the police of England and Wales is not given; 55 persons were brought to trial for murder; 23 were convicted of murder and sentenced to death; 14 were executed; the sentences of 8 were commuted to penal servitude for life; 12 were found guilty but insane; 11 by jury and 1 by Court of Criminal Appeal; 6 were found insane on arraignment and 14 were acquitted including one quashed conviction by Court of Criminal Appeal.

In 1914, 117 were brought to trial in England and Wales for manslaughter, of which 48 were convicted and sentenced.

According to the Canadian criminal statistics for the years ending Sept. 30, 1913, and September 30, 1914:

In 1913, 55 persons were charged with murder, of whom 23 were convicted and sentenced to death, 5 were detained for lunacy and 27 were acquitted.

In 1914, 62 persons were charged with murder, of whom 27 were convicted and sentenced to death, 4 were detained for lunacy and 31 were acquitted.

In 1913, 61 persons were charged with manslaughter, of whom 44 were convicted, 1 was detained for lunacy and 16 were acquitted.

In 1914, 59 persons were charged with manslaughter, of whom 39 were convicted and 20 were acquitted.

In 1913, also in 1914, two persons each year were charged with infanticide; all four were acquitted.

The population of the Dominion of Canada is given by the last census as 7,206,643.

Moorfield Storey, quoting Andrew D. White, says:

"The murder rate in the United States if from ten to twenty times greater than the murder rate of the British Empire and other northwestern European countries."

The *World* Almanac for 1911, 1912 and 1913, under "Statistics of Homicide," says convictions in Germany equalled 95 per cent. and a fraction; in the United States 1.3 per cent.

Frederick L. Hoffman, Life Insurance Statistician of Newark, New Jersey, says:

"Our murder death rate (for, of course, the statistics used refer only to the recorded deaths from homicide and not to judicial convictions) for the registration area for the period 1909-1913 was 6.4 per 100,000 of population. The rate for England and Wales (1904-1913) was 0.8; for Prussia (1904-1913), 2.0; for Australia (1910-1913), 1.9; and finally, for Italy (1908-1912), 3.6. In other words, the number of murders in the United States at the present time, proportionate to population, is about 100 homicides for every thirteen committed in England and Wales, thirty in Australia, thirty-one in Prussia and fifty-six in Italy. . . . It admits of no argument that among the civilized countries of the world the United States stands to-day in deplorable contrast as regards the security of the person against the risk of homicidal death."

In addition to "The Statute" extending the privilege of avoiding self-incrimination, "in tenderness to the weakness of those who . . . may have been in some degree compromised, 21 out of our 48 States have either by constitution or statute reduced the trial judge in jury cases to a mere moderator by forbidding him from advising the jury on the facts or expressing his opinion on questions of fact, notwithstanding that all questions of fact in jury cases are left to the jury's sole and ultimate determination. This took away a judicial right and duty which every English and Federal trial judge exercises to the public advantage. In 15 more of our States the State courts of last resort have by judicial decisions suppressed or abdicated their trial judges' right

and duty to act as judges and have reduced them to mere moderators.

Other results of statutory shelter to the guilty, statutory privileges of crime and statutory tenderness to the weakness of the compromised, accompanied by the trial judges in a majority of the States being forced to act as moderators and abdicate their inherent functions as judges to advise the jury on the facts.

Between 1882 and 1903 lynchings aggregating 3,337 were reported in 44 of our 49 continental States and Territories. In other nations lynching now exists only in parts of rural Russia where the laws provide an inadequate punishment for horse stealing. Lynching does not now exist anywhere under the British, French, Dutch or German flags (Cutler, Lynch Law, 1, 3), although all these nations have frontier and mixed race conditions in their colonies, dependencies and possessions, which if either mixed races or frontier conditions were primary causes of lynching, would lead to an amount of it in excess of anything we have ever known.

It is quite true that Anglo-Saxon popular tribunals and lynching originated in the marches of Scotland in the days of the border wars and was practiced also by the vehmgericht in Germany in the days when the power formerly exercised by the Hohenstaufen Emperors had been usurped by the robber knights; also that it was used in expelling Tories and desperadoes and confiscating their lands during the lawless times of and following the American revolution.

To understand popular tribunals and lynching, the attitude of the vigilants and their responsible supporters and neighbors is of more weight than that of the outlaws or the formal legalistic critics of the vigilants who confine their activity to destructive criticism and make no attempt to remedy the underlying causes that have led to popular tribunals, popular justice in 44 of our 49 continental States and Territories.

Dean J. E. Cutler and Judge George C. Holt attempted to ascertain the views of the neighbors and upholders of vigilants by questionnaires, but no answers of value were received.

Hubert Howe Bancroft's Popular Tribunals justifies the two San Francisco vigilance committees (of 1851, also of 1856)

as well as the other responsible vigilance committees of the Pacific Coast and what are now the Rocky Mountain States before the Civil War, on the ground of necessity, because the State and Territorial Governments had alike abdicated their primary duty to preserve life and enforce public order and security, also their duty to punish crime.

Bancroft was the confidant of the leading vigilants and had the free use of their archives and records.

Bancroft says:

"Sixteen executions in thirty years, dating back from 1847, the opening year of Yerba Buena's aspirations. These, with the four hangings by the Vigilance Committee of 1851, and four by that of 1856, comprise the catalogue. Millions of money have been paid by the citizens to keep running criminal courts and police regulations these thirty years, and hundreds of men were all the time at large whom the law pronounced guilty of death, and only sixteen capital punishments! Says the Sacramento *Union* of the 28th of May of the citizens composing the Committee of 1856:

"They have calmly stood by and seen and heard of some fourteen hundred murders in San Francisco in six years, and only three of the murderers hung, under the law, and one of those was a friendless Mexican.

"I have given in this volume many examples of Popular Tribunals, but the half has not been told. It is safe to say that thus far in the history of these Pacific States far more has been done toward righting wrongs and administering justice outside the pale of law than within it.

"Out of five hundred and thirty-five homicides which occurred in California during the year 1855 there were but seven legal executions and forty-nine informal ones. Of the latter, ten occurred in the month of January, not one of which would have been consummated if left to the machinery of law. So it was in Nevada ten years later; to one hundred and fifty homicides there were but two legal executions. It was the Augustan age of murder."

Bancroft quotes the London *Times'* view that if California's lax criminal law enforcement was so serious an evil as to need a

vigilance committee "to supersede the law of the land in open day" to restore public order, it "could have no possible difficulty in amending the administration of this law had they directed their efforts to such purpose instead of dispensing with law altogether."

Strong trial judges of the British Federal type, or a strong California criminal procedure of the English, Canadian or Australian type, which convicts the criminal instead of manumitting or enlarging him, was the last thing the vigilants or the Californians of 1851 to 1856 desired.

William T. Coleman (the president of the 1856 Vigilance Committee) wrote his executive committee:

"Keep all cases in California from judges, but have juries in all cases." (2 Bancroft, 616.)

Bancroft, voicing the vigilant view, says:

"There will be popular tribunals as long as evolution lasts. We are never going back to king worship or law worship." (2 Bancroft, 668.)

"Popular tribunals" and the so called "Right of revolution" were the vigilant ideals. (2 Bancroft Popular Tribunals 668-71, 675, 677-681, 154; Cutler, Lynch Law, 193-8, 226, 29-30, 72-3, 109-10; Royce, California, 421-2, 439-447, 465, 316-324.)

"But here on this coast had been law without order for years, and at last the people were determined to have order, even at the sacrifice, if necessary, of the forms of law. Law had become criminal, and must be put upon trial by the people for dereliction of duty." (2 Bancroft, 145.)

"For some few centuries yet the ironbound dogmatism of ancient societies will continue to condemn the action and principles of popular tribunals. . . . They will continue to see no difference between a mob and a committee of vigilance, between a turbulent, disorderly rabble, hot with passion, breaking the law for vile purposes, and a convention of virtuous, intelligent, and responsible citizens with a coolness of deliberation arresting momentarily the operations of law for the salvation of society. . . .

"But the time will come when intelligent men everywhere will acknowledge the superiority of this principle. . . . It

will then be seen that that government is most stable which is founded on rectitude and independence, which relies for its support on the will of virtue-loving people, and not on tradition or inexorable law. It will then be seen, more clearly than now, that all power vests in the people, whether they chose to use it or to remain bound by superstitious veneration of shadow, that even after law is made and execution provided, the executive has no power except such as is daily and hourly continued to him by the people." (2 Bancroft, 670-1.)

In California the trial judge in jury cases is a mere moderator and is not allowed to advise the jury on any question of fact.

Bancroft points out that Macaulay's prophecy of 1857 as to America's future danger was clearly inspired by San Francisco's two Vigilance Committees:

"Either some Cæsar or Napoleon will seize the reins of government with a strong hand, or your republic will be as fearfully plundered and laid waste by barbarians in the twentieth century as the Roman Empire was in the fifth; with this difference, that the Huns and Vandals who ravaged the Roman Empire came from without, and that your Huns and Vandals will have been engendered within your country by your own institutions."

The vital feaures in which the English, Australian and Canadian criminal procedure differs from that of the majority of American criminal courts are the following:

1. The British, Scotch, Canadian, Australian, South African or Indian trial judge is a strong judge, not a mere moderator. He gives the jury the benefit of his experience and skill by advising them in difficult cases respecting the weight and effect of the evidence, what he believes the evidence had shown, but he also informs the jury that they are the sole judges of the facts and are at liberty to disregard his advice. The distinctive feature of Anglo-Saxon jury trials is a strong experienced trial judge aiding and advising the jury, but leaving the ultimate decision of all disputed questions of fact to the jury, instead of acting as a weak and opinionless moderator, as the trial judge must do in three-fourths of our States. In Canada the judge may try most criminal cases without a jury where a jury is waived by defendant.

2. In Great Britain and Australia the trial judge in any criminal case where the defendant elects to stand mute (or fails to testify in his own behalf) may and generally does charge the jury that they may consider the defendant's failure to testify in his own behalf. New Jersey is the only American State where the trial judge may do this.

3. Blanket or joint indictments are allowed where (1) there are several charges against the defendant or defendants for the same act or transaction, (2) for two or more acts or transactions connected together, or (3) for two or more acts or transactions of the same class of crimes or offenses, as in the Federal Courts.

4. Short form simplified indictments merely charging defendant with the commission of any specified indictable offense in the very words of the statute, as for example "murder" or "grand larceny," supplemented by a bill of particulars when details are necessary.

5. Joint trials of all joint indictments are in the court's discretion, instead of separate trials being a matter of right.

6. Decisions of *habeas corpus* are final and conclusive as to the issues there involved. The unlimited number of writs of *habeas corpus* allowed in some American States for the same cause is unheard of anywhere in the British Empire.

7. Exceptions to rulings upon challenges of jurors are unheard of. An English judge's rulings upon the challenge of a juryman for cause are not subject to review as they are here.

8. No trial by newspaper, no publicity bureau work is allowed while any action, whether criminal or civil, is pending; only a true and fair report of evidence and court proceedings is allowed to be published *pendente lite*; sweat box and third degree are unknown alike among the police and public prosecutors. Trial by newspaper and publicity bureau work *pendente lite* are suppressed by vigorous enforcement of the common law practice in relation to contempt of court.

9. Reversals on appeal for harmless technical errors not affecting the result are unheard of. In Great Britain on appeal by defendant a sentence may be increased.

10. The keeping and publication of complete, scientific and

yet laconic judicial statistics, both criminal statistics and civil statistics.

11. Bar discipline is strictly enforced.

Throughout the British Empire there is a universal respect for the courts and the law, especially for the criminal law, which is unknown in this country.

The primary duty of all governments is to preserve life and enforce the public order and security by enforcing the criminal law as well as necessary police regulations. When this duty is locally or partially neglected, unless extra legal vigilance supplements the defective administration of the criminal law, local turbulence, riots and anarchy until suppressed by martial law are probable sooner or later.

When this duty is generally neglected throughout a nation for a sufficient period of time, class conflicts, general strikes, sectional strife, revolution or social war will usually follow unless the local disturbances or general national weakness becomes so great as to cause a foreign nation whose people are disciplined and orderly (though perchance with a lower standard of living, *i.e.*, with more plain living and more high thinking), to send either a punitive expedition to punish and procure indemnity for lawless outrages upon or assassinations of its nationals, or else an invading army to conquer and annex the decadent and anarchical country, as was done in the several partitions of the Polish Commonwealth during the 18th century; in Italy during the 16th century; as well as following the decline of Greece and the Greek cities of Asia Minor and Southern Italy by the Roman Republic.

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NOTES FROM THE ENGLISH INNS OF COURT.

The Opening of the Courts.

On Friday October 12 the Michaelmas Sittings were opened with all pomp and circumstance. Headed by Lord Chancellor Finlay the customary procession of judges passed up the Great Hall at the Royal Courts of Justice each judge with his attendant

clerk. They were followed by the Land Officers of the Crown and a large number of His Majesty's Counsel learned in the law. This is the only occasion in the year when the Great Hall serves any purpose connected with the law, although indeed since war began it has been put to strange uses—either as a drill ground for volunteers or as a place of safety during air raids. It only contains one ornament of note—the marble statute. Lord Russell of Killowen, seated in his judical chair, occupies the north-eastern corner of the hall.

Judicial Changes.

Notwithstanding the protests of the lay press, the Lord Chancellor had filled two judicial vacancies. Mr. Clavell Salter, K.C., M.P., has been appointed a judge in the room of Mr. Justice Low who died during the Long Vacation, while Mr. Alexander Adair Roche, K.C., takes the place of Mr. Justice Ridley who has resigned. Both appointments are heartily approved by the legal profession. Mr. Clavell Salter was a lawyer first and a politican afterwards. He was an able advocate both at nisi prius and in banc. His deliberate yet forceful eloquence had a wonderful influence with a jury. In the Court of Appeal it was a pleasure to listen to him. He always chose language in which there was no flaw, and he marshalled his facts and arguments in a perfect sequence. I recall an occasion when he was addressing a court in which the late Sir Richard Henn Collins, M.R., was presiding. Mr. Salter was apparently citing some authority, when the Master of the Rolls intervened:

"What part of the judgment are you reading from now, Mr. Salter?"

"Oh! my lord," said the advocate, "I was not reading anything, I was making my own observations."

"I beg your pardon" said the Master of the Rolls, "but your manner was so very judicial that I thought"—the rest of of the sentence was lost in the laughter which filled the Court.

Another Commercial Judge.

In Mr. Justice Adair Roche we shall welcome to judicial office a lawyer who has made his name in the Commercial Court.

Called to the bar in 1896, he took silk in 1912. He very soon became a leader of the first rank in all those cases where charter parties and bills of lading are subjects of discussion. A man of only 45 years of age and the youngest judge now on the Bench he ought soon to be numbered amongst its brightest ornaments.

His appointment is an illustration of a *dictum* atributed to Lord Mersea (or Sir John Bigham as he may be better known) that when personal and political considerations do not intervene judges are appointed not by the Lord Chancellor but by the people. Mr. Roche's services as an advocate have been so much in request amongst commercial men that he was forced into a position from which the Lord Chancellor was bound to remove him to the Bench.

No one knows what Mr. Roche's politics are; we lawyers only know that his legal attainments fully justify his appointment. Would that personal and political claims were always ruled out whenever judicial vacancies have to be filled!

Humour in the House of Lords.

In the recent case of *Jones* v. *Jones*, [1916] 2 A.C. 481, Lord Sumner made a suggestion which may (or may not) lead to an amendment in the law of slander. A school-master brought suit for slander. It imputed to him that he had been guilty of adultery. The defence was "that the words if spoken (which is denied) did not relate to the plaintiff in his profession as a certificated teacher, nor to him in his office as a head-master, and that the said words are not actionable without proof of special damage." No special damage was alleged. After various vicissitudes the case reached the House of Lords. It is well established that slander is actionable only if either (1) special damage is proved or (2) the imputation is such and the state of facts proved is such that the law presumes or infers damage or (3) the case falls within the Slander of Women Act, 1891. This act specially provides that words imputing unchastity to a woman shall be actionable without proof of special damage. After declaring that the right to sue for word spoken when no damage can be proved ought not to be extended, Lord Sumner said: "If a change of the

law is desired, it is from the legislature as it was in 1891 that relief must be sought. It could be simply obtained either by enacting that "a school-master, etc., should be deemed to be a woman within 54 and 55 Vict., C. 51, s. 1," or that for the purposes of actions of slander imputations of incontinence in a man should be deemed to be imputations of a criminal offence punishable by imprisonment."

The Mayor's Court, London.

The retirement of Sir Albert Bosanquet, who for 17 years has been Common Sergeant, calls attention to an ancient jurisdiction which is peculiar to the City of London. I wonder how many Canadian lawyers are aware that within a few miles of the Royal Courts of Justice, Strand, Middlesex, there is a court in which the old forms of pleading—that is to say the forms in use prior to the Common Law Procedure Act, 1852—are still observed; and in which judicial personages who are not Judges of the High Court of Justice exercise what is to all intents an unlimited jurisdiction. I refer to the Mayor's Court, in which the Recorder (now Sir Forrest Fulton) and the Common Sergeant are the judges. Suit may be brought in the Mayor's Court in respect of any cause of action which has arisen wholly within the city. It is said that a sum of about £1,000,000 was once claimed and recovered in this purely local court. Every case is set down to be tried with a jury. The court sits once a month throughout the year. An appeal lies on matters of law to a Divisional Court of the City of London.

Sir Albert Bosanquet.

In Sir Albert Bosanquet the city will lose a Common Sergeant who was a distinguished lawyer. On October 13th he took farewell of the Judges and counsel assembled at the Central Criminal Court. He said in reply to speeches made by the Recorder and Mr. Muir that "when I received my appointment a newspaper in giving reasons why the appointment was an improper one dwelt on the fact that the person then taking on himself the office was a man of exceeding dullness who had never made a

jest. On the Bench scarcely ever has a jest escaped my mouth. The strain on the faculties in trying to arrive at a right solution of a problem and the overwhelming responsibility of acting as judge in other men's cases seemed to remove from my mind the temptation to jest in a court of justice."

The Recorder and the Common Sergeant.

The Recorder and the Common Sergeant are appointed by the Lord Chancellor, but their substantial salaries are paid by the City of London. Their judicial functions are not confined to the Mayor's Court, for they are always in the Commission of those who try prisoners at the Old Bailey. It will be recalled that the present Recorder was the judge who presided at the trial of Adolph Beck whose conviction more or less directly resulted in the Criminal Appeal Act. Nor are the duties of these two lawyers merely judicial: At every city ceremony one or other of them is generally in attendance on the Lord Mayor, the Chief Burgess of the City visits the Courts on November 9, the address to the judges is always read by the Recorder.

Notwithstanding his resolution to eschew frivolity when on the Bench—a resolution faithfully kept—"Bozy," as our lawyers always called him, was full of fun and humour.

He is an after dinner speaker of the first order. When he was at the Bar where good speakers in every style are to be found, no legal banquet was regarded as complete without a speech from him. How great a boon must he have been in the city where dinners are in general more celebrated for their turtle soup than for their postprandial utterances?

A Ready Retort.

Sir Albert had a power which is characteristic of the really humorous speaker. He possessed and was able to maintain a funereal solemnity when saying the drollest things. This solemnity was in part due to his professional avocations. Immersed as he was in black letter law, he seldom had a case which could be furthered by any exercise of his ready wit. Indeed his style of

advocacy once excited the criticism of the late Sir Frank Lockwood. Mr. Justice Gainsford Bruce was a contemporary of Sir Albert. He, too, when at the bar, was regarded as a very dreary although very able exponent of the law. One day Sir Frank Lockwood said to Mr. Bosanquet, Q.C., "Really, Bozy, I think you are the very dullest man at the Bar!" To which the historic reply: "Have you considered the case against Gainsford Bruce?" But to hear Sir Albert after dinner was—and I believe still is—to rock your sides with laughter.

Dickens and the Law.

Mr. H. F. Dickens, K.C., has been appointed to succeed Sir Albert Bosanquet as Common Sergeant. Thus the sixth son of the author of "Pickwick Papers" takes a high place in the profession of which Charles Dickens always evinced such great knowledge and in which he was the means of bringing about such great reforms. It was largely through his influence—through his satire in "Bleak House," where he held the leisurely proceedings of the old Court of Chancery up to ridicule—that public attention was drawn to delays in our courts of equity. Again it was he who in "Little Dorrit" and "The Pickwick Papers" threw open to the popular gaze the internal arrangements of the debtors' prisons. The new Common Sergeant, one of our Senior King's Counsel, is a popular member of the legal profession.

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IS A CHARGE OF DISLOYALTY OR SEDITION LIBELLOUS?

A publication imputing disloyalty may be actionable *per se*, although it does not amount to a charge of a criminal offence. Hence, it is libellous *per se* to publish of one that he is a "man who reviled U.S. flag," "who denounced Old Glory as a dirty rag," a "red-tinted agitator," voicing "constructive sedition and

treason," keeping "beyond the last border of unloyalty and indecency" by "denouncing Old Glory as a dirty rag," and "wantonly insulted the symbol of a patriotic allegiance." *Wells* v. *Times Printing Co.* (1913), 77 Wash. 171, 137 Pac. 547. Such language, the Court said, required no innuendo to construe its meaning as intending to bring the individual of whom it was written into public hatred, contempt, and ridicule, expose him to public hatred, scorn, and shame, and cause him to be shunned and avoided by his fellows.

So also to publish of one that he is a "dangerous, able, and seditious agitator" is libellous *per se*. *Wilkes* v. *Shields* (1895), 62 Minn. 426, 64 N.W. 921. The Court stated that a seditious agitator can be neither a good citizen nor a fit associate for honourable men. The obvious meaning of the words, "a seditious agitator," as they would naturally be understood by ordinary men when published in reference to another, is that he is a disturber of the public peace and order, a subverter of just laws, and a bad citizen; and so the publication of such a charge is clearly libellous and actionable *per se*.

But to charge one with taking part in a revolt or revolution within a foreign government is held not libellous *per se*, in *Chrashley* v. *Press Pub. Co.* (1904), 179 N.Y. 27, 71 N.E. 258, 1 Ann. Cas. 196, in the absence of an allegation of the existence of some statute making such an act a treasonable offence and prescribing pains or penalties for the commission of the crime.—*Case and Comment.*

A letter to the *Times* suggests that during the war all civil actions should be tried by a judge without a jury. This would, it is claimed, and correctly so, save an immense amount of time and money—two important items these days. It would also shorten the length of a case, and, as claimed by the writer, be a death blow to speculative actions. There has been of late years a great encroachment on the old system of trial by jury; and, whatever may be the view taken on the jury system, the suggestion of saving the time of litigants and jurymen in these days of stress is a good one.

REVIEW OF CURRENT ENGLISH CASES.

(*Registered in accordance with the Copyright Act.*)

FIELD GENERAL COURT-MARTIAL—POWER OF COURT-MARTIAL TO SIT IN CAMERA.

The King v. *Governor of Lewes Prison* (1917) 2 K.B. 254. By the defence of the Realm Consolidation Act, 1914 (5 Geo. V. c. 8) s. 1 (4). "For the purpose of the trial of a person for an offence under the regulations by court-martial and the punishment thereof, the person may be proceeded against and dealt with as if he were a person subject to military law and had on active service committed an offence under section five of the Army Act." By Rules of Procedure 1907 and 119 *c.* "The proceedings shall be held in open Court in the presence of the accused, except on any deliberation among the members, when the Court may be closed." A prisoner found subject to trial by a field general court-martial was tried before such a court for participation in the Dublin rebellion. The Commander-in-Chief having come to the conclusion that it was necessary for the public safety and defence of the realm that the Court should sit in camera, he so ordered and the Court was so held. It was objected *inter alia* that this invalidated the conviction; but a Divisional Court (Lord Reading, C.J., and Darling, Avory, Rowlatt, Bailhache, Atkin, and Sankey, JJ.) held that there is an inherent jurisdiction in every Court, including a field general court-martial, to exclude the public from a trial, if it considers it necessary so to do for the administration of justice, and the objection was accordingly overruled.

INSURANCE—FUNERAL EXPENSES—TOMBSTONE.

Goldstein v. *Salvation Army Assurance Socy.* (1917) 2 K.B. 291. The plaintiff had obtained a policy of insurance from the defendants, and like policies from other insurances companies, against the funeral expenses of his mother, which kind of insurance is authorized by the Assurance Companies Act 1909 (9 Edw. VII. c. 49) s. 46. He claimed to have expended in funeral expenses £53 16s., which included £16 8s. 9d. for a tombstone. He had received from other insurance companies £39 and claimed to recover from the defendants £14 16s., the balance. As, however, it was not clear that the plaintiff had actually expended £53 16s., and if he had, that the Judge who tried the action had considered

whether or not the expenditure of £16 8s. 9d. was reasonable in the circumstances, a Divisional Court (Rowlatt and McArdie, JJ.) ordered a new trial.

SOLICITOR—LIEN—DOCUMENTS OBTAINED WITHOUT LITIGATION—BANKRUPTCY—TRUSTEE—DOCUMENTS RECOVERED BY SOLICITOR AFTER BANKRUPTCY—COSTS.

Meguerditchian v. *Lightbound* (1917) 2 K.B. 298. The Court of Appeal (Eady and Bankes, L.JJ., and Bray, J.) have affirmed the judgment of Rowlatt, J. (1917) 1 K.B. 297 (noted ante, p. 175).

INN-KEEPER—GUEST—FIRE—GUEST INJURED IN ATTEMPT TO ESCAPE FIRE—NEGLIGENCE OF INDEPENDENT CONTRACTOR.

Maclenan v. *Segar* (1917) 2 K.B. 325. This was an action by the plaintiff, who had been a guest at the defendant's hotel, to recover damages, by reason of the plaintiff having been seriously injured in her efforts to escape from the hotel after a fire had broken out therein. The fire was occasioned by a defective scheme for conveying the smoke and burning soot from the kitchen chimney. The defendant admitted the defect, but denied knowing of it prior to the fire. The jury found that the premises were not as fit as reasonable care and skill could make them; that the defect was due to the architect or builder of the hotel; and if the plaintiff had made no effort to escape but had remained in her room she would have been uninjured; but the jury found that, in the circumstances in which the plaintiff found herself, she had acted reasonably. McCardie, J., who tried the action, gave judgment for the plaintiff, holding that the defendant impliedly warranted the fitness of the premises, and was responsible for the defect, though he would not be liable for damages arising from defects which could not be discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair and maintenance of the premises.

RESTRAINT OF TRADE—TRADE COMBINATION TO CONTROL PRICES—AGREEMENT TO RESTRICT OUTPUT, TO SELL ONLY TO CERTAIN PERSONS AND ON TERMS AND AT PRICES TO BE FIXED BY COMBINATION—AGREEMENT UNLIMITED AS TO TIME—ACCOUNT STATED.

Evans v. *Heathcote* (1917) 2 K.B. 336. This was an action to enforce a trade combination. The plaintiffs, who were manufacturers of iron tubes cased in brass called "cased tubes," were

members along with the defendants, who were manufacturers of the same class of goods, of a trade combination association, by the rules of which the prices of such goods were regulated, and for that purpose each member was bound to restrict his output to a certain fixed percentage of the total output of the members, to be based on the actual output in preceding years. Each member whose output exceeded the stipulated amount agreed to pay the profits thereof into a "pool," while each member whose output was less than that stipulated was to receive a certain sum out of the "pool." The rules provided that the members should sell their cased tubes only on the terms, and at the prices which from time to time should be fixed by the association. No means were provided by which a person who had once joined the association could retire therefrom. By an agreement made between the plaintiffs and defendants, and certain firms, the plaintiffs, in consideration of the defendants fixing their percentage at a certain figure, agreed not to sell their cased tubes to any person other than the said firms. The agreement provided that it should continue in force so long as the association and a certain other society, over whom the plaintiff had no authority, continued to control prices. For several months the plaintiffs' output was less than their percentage, and they became entitled to receive from the association sums of money out of the "pool," and the secretary of the association furnished them each month with an account showing the amount they were entitled to for that month. The action was brought to recover the amount so due. Low, J., who tried the action, however, held that the restraint of trade imposed by the agreement and rules was unreasonable as between the parties, and consequently illegal, and not enforceable; and that the plaintiffs could not recover either under the agreement, or rules, or upon the account stated by the secretary. The claim on the account stated failed because the sole basis for the account was the arrangement which the Court found to be illegal.

CONTRACT—SALE OF GOODS—CONVEYANCE TO BE BY PARTICULAR ROUTE—TRANSMISSION BY DIFFERENT ROUTE FROM THAT AGREED—USAGE AS TO ALTERNATIVE ROUTE—EVIDENCE.

In re Sutro & Heilbut (1917) 2 K.B. 348. The point decided in this case is briefly this: Where a contract is made for the sale of goods to be forwarded by a specified route, evidence of usage authorizing the vendor to adopt an alternative route is inadmissible, because it is inconsistent with the express terms of the contract; and where the vendor transmits the goods by a different route from that contracted for, the purchaser is not bound to accept them.

SHIP—BILL OF LADING—EXCEPTIONS—HARTER ACT—LIMITATION OF LIABILITY—GOODS ABOVE A CERTAIN VALUE—OMISSION TO DECLARE VALUE.

Hordern v. *Commonwealth & Dominion Line* (1917) 2 K.B. 420. This was an action to recover against shipowners damages for non-delivery of goods. The goods in question were shipped under a bill of lading expressed to be subject to all the terms and exceptions of an Act of the U.S. Congress, known as "the Harter Act," which makes it unlawful for the owner of any vessel to insert in any bill of lading any claim relieving him from liability for negligence, or default, or failure in proper loading, storage, custody, care, or proper delivery of merchandise, and makes null and void all clauses of such import in any bill of lading. The bill of lading in this case contained a clause purporting to free the shipowner from liability for any one package which was of more value than £100 unless its value should be declared, and extra freight paid in respect thereof. The shipowner failed to deliver one package worth more than £100. The value thereof had not been declared, and no extra freight paid in respect thereof. The action was tried before Horridge, J., who held that the clause purporting to limit the shipowners' liability was inconsistent with the Harter Act, and was consequently null and void, and that the plaintiffs were entitled to recover.

It would seem from the judgment that the learned Judge was of the opinion that the end the shipowners had in view might be attained by an agreement as to the value of the property carried.

INSURANCE—STATEMENT FORMING BASIS OF CONTRACT—ARBITRATION CLAUSE—DIFFERENCE ARISING OUT OF POLICY—TRUTH OF STATEMENT—VALIDITY OF POLICY—BURDEN OF PROOF.

Stebbing v. *Liverpool & London Insurance Co.* (1917) 2 K.B. 433. This was a special case stated by an arbitrator. The reference arose out of a policy of insurance which contained a clause whereby "all differences arising out of this policy" were to be referred to arbitration. The policy recited that the assured had made a proposal and declaration as the basis of the contract, and contained a clause that compliance by the assured with the conditions indorsed on the policy should be a condition precedent to any liability on the part of the insurers. One condition provided that if any false declaration should be made or used in support of a claim, all benefit under the policy should be forfeited. The insurers claimed that statements in the assured's proposal and declaration were false. The questions for the

Court were whether the truth or untruth of the statements in question could be inquired into by the arbitrator, and if so on whom the burden of proof rested. The Divisional Court (Lord Reading, C.J., and Ridley, and Avory, JJ.) held that the truth or untruth of the statements was a matter covered by the arbitration clause, and that the burden of proof was on the insurance company.

BANKER—CHEQUE—FRAUDULENT RAISING OF AMOUNT OF CHEQUE —NEGLIGENCE IN LEAVING SPACE IN CHEQUE—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. c. 61) ss. 9 (2), 20—(R.S.C. c. 119, ss. 28 (2), 31).

Macmillan v. *London & Joint Stock Bank* (1917) 2 K.B. 439. This was an appeal from the decision of Sankey, J. (1917) 1 K.B. 363 (noted ante, p. 178). It may be remembered that the plaintiffs had issued a cheque for £2, but so filled up that it admitted of alteration, and had in fact been fraudulently altered by their clerk by increasing the amount of it to £120. The defendants contended that under ss. 9 (2) and 20 of the Bills of Exchange Act, 1882 (R.S.C. c. 119, ss. 28 (2) and 31) as against them the cheque was valid and could not be treated as a forgery: but the Court of Appeal (Eady and Scrutton, L.JJ., and Bray, J.) affirmed the decision of Sankey, J., and in effect overrule *Young* v. *Grote* (1827) 4 Bing. 253.

COPYRIGHT—TELEGRAPHIC CODE—"ORIGINAL LITERARY WORK" —COPYRIGHT ACT, 1911 (1-2 GEO. V. c. 46) ss. 1, 35.

Anderson v. *Lieber Code Co.* (1917) 2 K.B. 469. This was an action for damages for an infringement of the plaintiff's copyright in a telegraphic code which was compiled of meaningless words of five letters. It was contended by the defendants that such a work was not "an original literary work" within the meaning of the Copyright Act; but Bailhache, J., who tried the action, negatived that contention, and gave judgment for the plaintiffs for the damages assessed by a jury at £1,250.

LANDLORD AND TENANT—NUISANCE—OVERHANGING TREES ON LANDLORD'S PREMISES—LESSOR'S DUTY TO LESSEE.

Cheater v. *Cater* (1917) 2 K.B. 516. The plaintiff in this case was the lessee of the defendant. On the premises of the defendant, adjoining the land demised to the plaintiff, yew trees were growing which overhung the demised premises. The plaintiff's mare ate of the yew trees, and died in consequence. The

action was brought to recover damages for the loss of the mare. The case was tried by a Judge of a County Court who thought the case governed by the dictum of Mellish, J., in *Erskine* v. *Adam* (1873) L.R. 8 Ch. 756, 761, and dismissed the action. The Divisional Court (Lord Coleridge and Rowlatt, JJ.) was divided in opinion. Coleridge, J., agreed with the County Court Judge, but Rowlatt, J., thought the case was within the principle of *Rylands* v. *Fletcher* (1868), 3 H.L. 330, and that the defendant was liable. In the result the appeal failed.

CONTRACT—MARRIAGE—ENGAGEMENT RING—BREACH OF ENGAGEMENT TO MARRY—RIGHT TO RETURN OF RING.

Jacobs v. *Davis* (1917) 2 K.B. 532. This was an action by a disappointed swain to recover from the defendant who had promised to marry him, the engagement ring. The plaintiff swore that the ring had been given to the defendant on the express condition that if the defendant did not marry the plaintiff the ring was to be returned. Sargant, J., who tried the action, seems to have discredited this story; but he held that there is nevertheless an implied condition that a gift of this kind is to be returned if the marriage does not take place, and he gave judgment for the plaintiff.

MARRIAGE—LICENCE—FALSE STATEMENTS IN DECLARATION—NULLITY—DECREE NISI—INTERVENTION OF CHILD.

Plummer v. *Plummer* (1917) P. 163. This was an appeal by an infant from a decree of nullity of marriage of his parents in the following circumstances: The plaintiff and defendant were married by licence before a registrar. In order to keep the marriage secret from her father whose consent was necessary, the defendant being a minor, her true name "Loveday" was not given in the information required to be furnished to the registrar, and she was styled "Findlow." The license was issued and the defendant was married under the name of "Findlow." The husband brought a suit for nullity which was undefended and Deane, J., pronounced a decree nisi. The Court was not informed that there was issue of the marriage. Subsequently an application was made to the Court on behalf of the appellant for leave to intervene and appeal from the decree, which was granted. The Court of Appeal (Lord Cozens-Hardy, M.R., and Bankes, and Warrington, L.JJ.) held that the giving of the false name did not invalidate the marriage in the case of a marriage by licence; though in the case of a marriage by banns, the publication of banns in a false name would invalidate the marriage.

COMPANY—PROSPECTUS—UNTRUE STATEMENTS IN PROSPECTUS—DIRECTOR—DEATH OF DIRECTOR—ACTIO PERSONALIS MORITUR CUM PERSONA.

Giepel v. *Peach* (1917) 2 Ch. 108. This was an action brought against the personal representative of a deceased director of a limited company, to recover damages arising from untrue statements contained in the company's prospectus. Sargant, J., who tried the action, held that in the absence of any evidence shewing that property, or the proceeds or value of property belonging to the plaintiff, had, by reason of the tortious act complained of been added to the deceased director's estate, the maxim *actio personalis moritur cum personâ* applied, and the action would not lie.

WILL—LEGACY—CONDITION THAT LEGATEE SHALL NOT BE A ROMAN CATHOLIC—INFANT—ELECTION OF RELIGION—WHEN TO BE MADE—GIFT OVER.

In re May, Eggar v. *May* (1917) 2 Ch. 126. By her will a testatrix bequeathed two legacies of £5,000 each to two nephews on their attaining 24, conditioned on their not being Roman Catholics, or, being Roman Catholics at the time of her decease, should cease to be so before the expiration of twelve months after the testatrix's death. At the time of the death both legatees were infants. Their father was a Roman Catholic, and both infants had been baptized according to the rites of the Roman Catholic Church. There was a gift over in the event of the condition not being complied with. More than a year had elapsed since the testatrix's death and the legatees continued to be brought up as Roman Catholics, and the question Neville, J., was called upon to decide, was whether or not the gift over had taken effect. He held that so long as the legatees were under the age of 21 they were not bound to make any election as to their religion, and it would be open to them after they attained 21, and before attaining 24, to elect whether or not they would be, or remain Roman Catholics.

WILL—DIRECTION TO PAY ANNUITY "FREE OF ALL DUTIES"—INCOME TAX.

In re Saillard, Pratt v. *Gamble* (1) (1917) 2 Ch. 140. The question in this case was whether an annuity bequeathed to a solicitor as compensation for his trouble in acting as executor "free of all duties," was to be paid free from income tax. Neville, J., decided in the negative.

TRADING WITH THE ENEMY—VENDOR AND PURCHASER—SALE OF LAND BY ATTORNEY OF ALIEN ENEMY.

Tingley v. *Muller* (1917) 2 Ch. 144. This is a case which has been already referred to in this journal. The defendant was a German resident in England. On May 20, 1915, he left England to return to Germany. Prior to his departure he gave an irrevocable power of attorney to his solicitors to sell his house in England; and the attorney, after the donor of the power had become an alien enemy, entered into a contract to sell the house to the plaintiff. The plaintiff subsequently discovered that at the time of the contract the vendor was an alien enemy, and he therefore brought the present action to have it declared that the contract was void, and for a return of his deposit. Eve, J., who tried the action, dismissed it on the ground that there was no sufficient evidence that the vendor at the time of the sale was in fact an alien enemy; but on this point the Court of Appeal (Lord Cozens-Hardy, M.R., and Eady, and Bankes, L.JJ.) found that he had erred; but they affirmed his judgment because at the time the power of attorney was given the donor was not an alien enemy, and that it was irrevocable, and might be carried out without further intercourse wth the donor, and with the assistance of the custodian under sec. 4 of the Trading with the Enemy Amendment Act, 1916, to whom so much of the purchase money as the vendor was beneficially entitled could be paid.

TRADING WITH THE ENEMY—PAYMENT OF DEBTS DUE BY ENEMY —GERMAN ORDINANCE CANCELLING LIABILITY TO PAY INTEREST ON DEBTS DUE BY GERMANS PENDING THE WAR.

In re Krupp (1917) 2 Ch. 188. Certain assets of a German firm were being administered in England, out of which certain English creditors claimed to be paid. It was conceded that their debts were governed by German law, and that under the ordinary German law they bore interest from maturity at the rate of 5% per annum. But, after the war, an ordinance had been made in Germany cancelling the liability to pay interest on debts due to German enemies. Younger, J., held that this not being part of the ordinary law of Germany would not be recognized by English Courts, and he held that the debts in question bore interest according to the ordinary German law.

SETTLEMENT—REAL ESTATE—NO WORDS OF LIMITATION—EQUITABLE ESTATE.

In re Gillies, Archer v. *Penny* (1917) 2 Ch. 205. The question in this case was whether an equitable estate in fee could pass to a

cestui que trust without words of limitation. The facts were that by a voluntary settlement made in 1869 the settlor (after reciting that he was seized of, or entitled to, hereditaments in fee, and that, in consideration of natural love and affection for his wife and children, he was desirous of conveying the same upon the trusts and subject to the powers thereinafter declared) granted unto trustees therein named their heirs and assigns the lands in question, upon the trusts thereafter declared, viz.: upon certain trusts in favour of the settlor and his wife, during their joint lives, and the life of the survivor, and, subject thereto, upon trust for such one or more of their children as they should by deed jointly appoint, and in default of such appointment as the survivor of them by deed or will should appoint, and, in default of such appointment in trust for all their children who, being sons, should attain 21 or, being daughters, should attain that age or marry, in equal shares. The settler empowered the trustees to apply "the annual income of the share or fortune" to which any child should for the time being become entitled, for his or her maintenance; and further empowered the trustees to sell the trust estate and invest the proceeds upon the trusts thereinbefore declared. The father and mother being dead, and no appointment having been made, the question was raised whether or not the children took equitable estates in fee simple. Eve, J., who heard the case, held that the recitals in the deed were not a sufficient indication that the children were to take a fee, neither was the maintenance clause; neither was the clause empowering the trustees to sell the trust estate: but he was of the opinion that the powers of appointment showed clearly that the donees were authorized to appoint the fee, and were a sufficient indication of the settlor's intention that the children should take in default of appointment as large an estate as might have been appointed to them under the powers.

PRIZE COURT—OUTBREAK OF WAR—DAYS OF GRACE—ENEMY YACHT—HAGUE CONVENTION NO. 6 ARTS. 1, 2.

The Germania (1917) A.C. 375. In this case the simple point to be determined was whether the Hague Convention, allowing days of grace to enemy's vessels in port at the outbreak of a war, applied to pleasure vessels. The President of the Admiralty Division held that it did not, but that it only applied to merchant vessels (1916) P. 5 (noted ante vol. 52, p. 189), and with that conclusion the Judicial Committee of the Privy Council (Lords Parker, Sumner, Parmoor, and Wrenbury, and Sir Arthur Channell), agree.

COMPANY—ANTI-CHRISTIAN OBJECTS—CAPACITY TO RECEIVE GIFTS—BEQUEST TO ANTI-CHRISTIAN COMPANY—VALIDITY OF BEQUEST—BLASPHEMY ACT 1697 (9-10 WM. III., c. 32) (9 WM. III., c. 35 Rev. Stats.).)

Bowman v. *Secular Society* (1917) A.C. 406. This was an appeal from the Court of Appeal (1915) 2 Ch. 447 (noted ante vol. 52, p. 67). The question at issue being whether a bequest to a society incorporated "to promote the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end all thought and action." It was contended that the Society was anti-Christian in its objects and the bequest, therefore, illegal; but the House of Lords (Lord Finlay, L.C., and Lords Dunedin, Parker, Sumner, and Buckmaster) have affirmed the judgment of the Court of Appeal upholding the validity of the bequest, the Lord Chancellor dissenting. This case looks very like an instance of judicial legislation. In arriving at their conclusion the majority of their Lordships are no doubt influenced by the so-called "liberal" tendencies of the age, and the general trend of legislation in favour of more tolerant views than formerly prevailed in regard to religious questions. Jewish Judges may now sit on the Bench of Justice, and if the constitution is so changed as to authorize such a departure from former practice, it is difficult to see how the former legal antagonism to all anti-Christian opinions, can well be maintained with any regard to consistency. The Lord Chancellor takes the view, however, that such changes in the law should be accomplished by legislation and not by judicial decisions.

CONTRACT—CONDITION—SUSPENSION OF DELIVERY—PREVENTING OR HINDERING DELIVERY—WAR—SHORTAGE OF SUPPLY—RISE IN PRICE.

Tennants v. *Wilson* (1917) A.C. 495. This was an appeal from the decision of the Court of Appeal (1917) 1 K.B. 208 (noted ante p. 140). The contract for the sale of goods in question in the action was subject to a condition that it should be suspended pending any contingencies beyond the control of the sellers (such as war) causing a short supply of labour, fuel, raw material, or manufactured produce, preventing or hindering the delivery of the goods in question. The greater part of the goods in question available for the British market came from Germany, which supply was stopped by the war, and caused a substantial shortage of the goods, and a consequent rise in price; and the question

at issue was whether or not in these circumstances the condition as to suspension took effect. The Court of Appeal held that the condition referred to a physical or legal prevention, and not to an economic unprofitableness arising from a rise in price: the House of Lords (Lord Finlay, L.C., and Lords Haldane, Dunedin, Atkinson, Shaw, and Wrenbury), have reversed this decision (Lord Finlay dissenting) being of the opinion that, apart from the question of price, the evidence showed a shortage in the supply of the goods in question which hindered the sellers from fulfilling their obligations under the contract in the ordinary course of their business.

APPEAL TO PRIVY COUNCIL—LIMITATION OF RIGHT OF APPEAL TO HIS MAJESTY IN COUNCIL.

Jones v. *Commonwealth Court of Conciliation* (1917) A.C. 528. By the Australian Constitution Act 1900 (63-64 Vict. c. 12) s. 74, it is provided that no appeal shall lie from a decision of the High Court upon any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and any State or States unless the High Court shall certify that the question is one which ought to be determined by His Majesty in Council. The Commonwealth constituted a Court for the determination of labour disputes, as empowered to do by the above mentioned Act, which Court made an award as to wages and conditions of labour. The High Court discharged a rule *nisi* for a prohibition, holding that there was an industrial dispute extending beyond the limits of any one State, and, therefore, that the Court below had jurisdiction; and the High Court refused to grant a certificate under s. 74, above referred to. In these circumstances the Judicial Committee of the Privy Council (Lords Loreburn, Haldane, Atkinson, Sumner and Parmoor) held that no appeal lay to the King in Council because "the High Court decided that the frontier of the Commonwealth power reaches in this case into the State, and it therefore followed that the State has not exclusive, if any, power in this case. This appears to their Lordships to be a question as to the limits *inter se* of the several powers, *i.e.*, of the Commonwealth and State, and therefore within the terms of s. 74."

Reports and Notes of Cases.

Province of Saskatchewan.

SUPREME COURT.

Full Court] [35 D.L.R. 473

ANDERSON v. CANADIAN NORTHERN RY. CO.

Railways—Injury to animals at large—Wilful act—Negligence.

"Wilful" in sec. 294 (4) of the Railway Act, ch. 37 R.S.C. 1916, means "intentional," and an owner who intentionally turns his animals at large cannot recover damages if they stray to a railway right of way and are killed thereon by a train.

G. E. Taylor, for appellants; J. N. Fish, K.C., for respondents.

ANNOTATION ON ABOVE CASE FROM 35 D.L.R.

In *Greenlaw* v. *C.N.R. Co.* (Man.) 12 D.L.R. 402, the plaintiff had purposely turned cattle at large to graze, relying on a municipal by-law which permitted it, and the Court distinctly held his "intentional" act was neither "negligence" nor a "wilful" act within the meaning of sec. 294 (4) of the Railway Act. The latest decision of the Saskatchewan Court, *en banc*, adopts a diametrically opposite view, and, it is submitted, the correct one, upon the meaning of the word "wilful."

In *Early* v. *C.N.R. Co.* (Sask.) 21 D.L.R. 413, the plaintiff was held guilty of a "wilful" act in allowing his cattle to run at large, but Haultain, C.J., intimated plainly that if a by-law had been proven, permitting cattle to run at large, he would have adopted the decision in the *Greenlaw* case. It is worthy of note that he concurred in the judgment of Newlands, J., in *Anderson's* case (*supra*), and it would have been illuminating if he had given his reasons for his latest and soundest view on this point.

In *Koch* v. *G.T.P. Branch Lines Co.*, 32 D.L.R. 393, the plaintiff had done what a prudent man would to keep his cattle in an enclosure, and there was no intentional "turning at large," so that the meaning of "negligence" or "wilful act or omission" did not have to be decided, and the effect of a by-law had not to be considered; but Lamont, J., held, nevertheless, that "it is not negligence to do that which is authorized by law," and in this Newlands, J., concurred. This case has been reported as though the full Court agreed with Lamont and Newlands, JJ., and so it was treated by Elwood, J., in *Anderson's* case (see 33 D.L.R., at p. 421), but, in fact, Brown and McKay, JJ., while agreeing in the result in the *Koch* case, did not express any opinion as to the effect a by-law would have.

It is regrettable, perhaps, that certain of the Saskatchewan Judges in the *Anderson* case should have expressed opinions upon the meaning of "negligence" in sec. 294 (4) of the Railway Act, for the Court was unanimous in its decision that the act of the plaintiff in turning his cattle at large was "wilful," and it was, consequently, unnecessary to define "negligence." The definition was given, however, and was manifestly wrong, we submit.

In the *Greenlaw, Early* and *Anderson* cases the cattle were intentionally turned at large, and, therefore, no question of "negligence" properly arose, for the acts of the plaintiff were clearly "wilful." In the *Koch* case, the animals got at large through a broken gateway, and it was held that the plaintiff had not been remiss in relation thereto. The opinion expressed by Lamont, J., that "where there exists a valid by-law permitting it, an owner cannot be held guilty of negligence in allowing animals to run at large," was, therefore, *obiter;* he repeated it, however, in the above reported judgment, and it was concurred in by all the Judges, except Brown, J.

A Saskatchewan statute says that it shall be lawful to allow animals at large unless the municipality prohibits it. Section 294 (4) of the Railway Act says that no animals shall be permitted to be at large upon any highway, within half a mile of any railway crossing, unless in charge of a competent person. In the *Anderson* case the cattle got from the highway to the railway at a crossing. Assuming the constitutionality of both statutes, surely the Saskatchewan statute, the later of the two, should be read to mean that animals may be at large *where not by law prohibited.* If so, no "valid by-law" or statute permitted Anderson's cattle to be at large upon the highway at the point where they left it to go upon the railway, and consequently Anderson's conduct in allowing them to be there was both negligent and unlawful. The only effective answer which can be made to this is, that sec. 294 (1) is *ultra vires* the Dominion Parliament, and Judges in *Anderson's* case gave indications that they might hold this, if necessary, but they did not do so, and until a decision to that effect has been made the sub-section stands as law. Lamont, J., points out, however (*supra*), that being at large in violation of sec. 294 (1) of the Railway Act is not *per se* the "negligence" meant in sec. 294 (4), for despite the fact that animals were at large in violation of sec. 294 (1) the owner can recover under sec. 294 (4) unless the railway company can show that they were so at large by reason of the owner's "negligence" or "wilful act or omission." But while this is quite true, it is not a good answer for the purpose to which Lamont, J., put it, for he had said that there could be no negligence in letting cattle at large where a *valid* law permitted them to be, and the defendants had replied that no by-law could *validly* permit the cattle to be upon the highway at a railway crossing, unless in charge of competent persons; in other words, sec. 294 (1) was a good answer to the argument that the by-law (or provincial statute) was valid for the purpose of permitting the cattle to be on the highway at the point from which they got upon defendants' property. What Lamont, J., meant was,-that breach of the duty imposed by sec. 294 (1) was not *per se* the "negligence" meant by sec. 294 (4); that is, that mere breach of a legal obligation to keep the animals from being at large is not the "negligence" meant. That is quite right, but what Lamont, J., seems not to have realized is, that if "carelessness" is the kind of negligence

meant by sec. 294 (4), it is no answer that when it exists in fact its effect can be escaped by saying its result in enabling the cattle to be at large was permitted by a by-law or provincial statute, for breach of law is not the essence of the "negligence," but lack of care to keep animals from straying.

The "negligence" referred to in sec. 294 (4) of the Railway Act is not a narrow, thin-skinned legal conception; it is negligence in fact, that is, the careless as distinguished from the wilful act or omission of the owner. "Negligence is the absence of the care, skill and diligence which it is the duty of the person to bring to the performance of the work which he is said not to have performed" (*per* Willes J., *Grill* v. *General Iron Colliery Co.*, 35 L.J. C.P. 330). Sec. 294 (4) assumes that—it is the duty of the owner of animals, towards the railway, to prevent them from getting at large by his negligence or his wilful act or omission; it does not say "legally" at large, but at large in fact—and while on the one hand it is no proof of negligence or wilful act or omission, that the animals are in fact at large in violation of sec. 294 (1), it is equally no answer to proof of negligence or wilful act or omission under sec. 294 (4) that any provincial statute or municipal by-law permitted animals to be at large. The owner, in other words, who carelessly or intentionally enables his cattle to get at large, relying upon such a statute or by-law, takes the risk that he cannot recover damages against a railway if his animals are killed upon a right-of-way.

In reality, neither a violation of sec. 294 (1), nor permission accorded by by-law or provincial statute, has anything whatever to do with "negligence or wilful act or omission" under sec. 294 (4). The former prohibits under a penalty, and the provincial statute permitting animals at large merely means that being at large is not unlawful *per se*. The statute (ch. 32, Sask.) expressly says that nothing therein shall "in any wise affect rights or remedies at common law or otherwise for the recovery of damages *by any animals*." Surely it was equally not meant to affect liability to the owner of animals at large. If this be so, what in the world has this statute to do with the question whether an owner has been guilty of "negligence" in allowing his animals to get at large?

Lamont, J., says that sec. 294 of the Railway Act is to be construed as saying that if an owner deliberately (*i.e.*, intentionally) allows his animals to be at large, and they are killed, he has no remedy. That is good law; is it not equally so to say that if his carelessness enables them to get at large he has no remedy? How can it reasonably be said that sec. 294 (4) penalizes "intention" and not "inattention?"

In the *Koch* case (32 D.L.R., at p. 394), Lamont, J., very concisely said: "Negligence (in sec. 294 (4)) means that the plaintiff did not take the precautions to prevent his animals getting at large which an ordinarily cautious and prudent man would," but later in the same case he says (p. 396): "Where there exists a valid by-law permitting animals to run at large, an owner cannot be held guilty of negligence in permitting them to so run." In relation to the duty the owner of animals owes to the railway, or, to put it another way, in relation to the basis of the railway liability (*i.e.*, that the animals shall not have got on the railway by default or act of the owner), what difference does it make that the owner's default or act was the exercise of a legal privilege?

The counterclaim for trespass was dismissed on the ground that the animals were at large lawfully (under the provincial statute), and that the defendants had not fenced their track. Here is where the constitutionality of sec. 294 (1) should have been considered, for if it is *intra vires* legislation, Anderson's cattle were not at large lawfully upon the highway at the point from which they escaped to the railway, and the whole argument drawn from *Tillett* v. *Ward*, 10 Q.B.D. 17, fell to the ground. That case was cited in support of the principle that if cattle are lawfully using a highway, their owner is not liable for their escape to adjoining lands. That is not the essence of that case. There the cattle were in charge of competent persons, and their escape was accidental. It is lawful to put your cattle on your own pasture, but you are liable if they escape therefrom to your neighbour's land, through your carelessness. Driving cattle along a road is necessary, and escape may be unavoidable; if it has been, you are not liable. But *Tillett* v. *Ward* did not mean that if the cattle there had been in the care of children, for instance, the owner would not have been liable. The Saskatchewan statute says that cattle may be permitted to be at large, but does not say that if they be, their owner is not liable for damages they commit on the property of other persons. On the contrary, it says that nothing in the Act shall affect the rights of other persons than the owner for damages for trespass on property. At common law, Anderson would have been liable in trespass for the entry of his animals on the railway. How then in face of the very words of sec. 2 of the provincial statute can it be said that he was not liable because the statute legalized the running at large by the cattle, and the railway was bound to protect its property by fencing its tracks?

All through this series of cattle cases the effect of local surroundings is seen in the interpretations placed by the Judges upon the statutes. To allow cattle at large, and to hold railways liable, is in the very air of the west.

The proper way to do that, if advisable, is by a new Dominion statute, not by fantastic interpretations of perfectly plain existing provisions.

ALFRED B. MORINE.

War Notes.

His Majesty The King has issued and called upon all his subjects to observe the sixth day of January, 1918, as a special day of prayer in connection with the war. His proclamation is as follows:

"The world-wide struggle for the triumph of right and liberty is entering upon its last and most difficult phase. The enemy is striving by desperate assault and submarine intrigue to perpetuate the wrong already committed, and to stem the tide of a free civilization. We have yet to complete the great task to which more than three years ago we dedicated ourselves.

"At such a time I would call upon you to devote a special day to prayer, that we may have the clear-sightedness and strength necessary to the victory of our cause."

We venture to express the hope that all who have the interest of the Enpire at heart will observe the day with due solemnity and in the right spirit.

An English contemporary congratulates the country upon the fact that the convictions for drunkenness in England and Wales are on the decrease. The total for 1916 was 84,191, as compared with 135,811 in 1915—a decrease of 38 per cent., following a decrease of 26 per cent. in the preceding year. This is gratifying, but the number is still very much too great, expecially in these days when all grain is wanted for food. The drink habit in the Motherland is not only a national waste of food products, but is also a national sin which should be repented of.

If, as all thoughtful people believe, the awful carnage and misery of the present day are a judgment upon nations for national sins and for a turning away from God, it would be well that all should know it and act accordingly.

A WAR SONNET.

The Principal of the Law School of Ontario, Dr. N. W. Hoyles, D. Ch., K.C., in his report for the Law School term of 1916-17, draws attention to a sonnet written by Major J. Langstaff, one of the most distinguished of the graduates of the School, who was killed in action last February (see ante p. 119). These beautiful lines were scribbled on a sheet of paper found among his effects returned to Canada. They are as follows:—

"I never thought that strange, romantic War
Would shape my life and plan my destiny,
Though in my childhood's dreams I've seen his car
And grisly steeds flash grimly thwart the sky.
Yet now behold a vaster, mightier strife
Than echoed on the plains of sounding Troy,
Defeats and triumphs, death, wounds, laughter, life
All mingled in a strange complex alloy.
I view the panorama in a trance
Of awe, yet colored with a secret joy,
For I have breathed in epic and romance,
Have lived the dreams that thrilled me as a boy!
How sound the ancient saying is, forsooth!
How weak is Fancy's gloss of Fact's stern truth!

J.M.L."

SOLDIERS' WILLS.

The indomitable Britisher when in the midst of all the horrors of war will not be deprieved of his joke, and even, when in contemplation of his possible death, will give a jocular tone to his testamentary directions. This has been manifested in the wills of private soldiers written in their army pay books which each one carries about with him. Here for instance is the will of a private written while on duty at a listening post in "No man's land:"

"I haven't a sweetheart, I haven't a mother,
I've only one sister, not even a brother;
My sister Susan is all I've got.
So of ought that's mine she can have the lot."

This will went through the courts without question, despite its unusual form. Another will in rhyme, leaving the money to the "first comer," is the following:

"Whoever first sets eyes on this
Gets everything I leave.
For my kith and kin are dead and gone.
And I've not a friend to grieve.
There's a tidy bit in the bank you'll find.
And my army pay, though small.
So stranger, breathe one sigh for me.
You're welcome to it all."

This will was forwarded to England by the young sergeant who found it and he shortly afterwards received notification that the "tidy bit," which turned out to be a substantial sum of money, had been deposited to his account.

THE LIVING AGE. Weekly. Boston, U.S.A.—We again call our readers' attention to this valued periodical. It is a collection of interesting articles from the best of our magazines and quarterlies, enlivened by fiction. The war news, so interesting and always so saddening, of course, largely fills our vision. There are those, however, who desire reading of another character to relieve the strain. This they will find in the pages of this excellent serial.

Canada Law Journal.

VOL. LIII. TORONTO, DECEMBER, 1917. No. 12

MORTGAGE ACTIONS AND THE STATUTES OF LIMITATIONS.

The Supreme Court of Canada has in the case of *Smith* v. *Darling*, 55 S.C.R. 82, affirmed the decision of the Appellate Division of the Supreme Court of Ontario, 36 O.L.R. 587, and it may now be taken to be settled that the disability clauses of the Statute of Limitations (R.S.O. c. 75) do not apply to actions of foreclosure or redemption.

That an action for redemption against a mortgagee in possession in Ontario is "an action to recover land," no one who is familiar with the present procedure of the Supreme Court of Ontario can have any reasonable doubt, because in the action the defendant may be ordered on payment of what, if anything, may be found due to him, to deliver up possession of the mortgaged lands to the plaintiff. Under the former procedure in equity an action of ejectment might have been necessary in order to enable the plaintiff to get possession, as was the case in actions of foreclosure at one time in England, see *Heath* v. *Pugh*, L.R. 6 C.P.D. 345, but even in that case it was held that an action of foreclosure was "an action to recover land" and stayed the running of the statute. But it is many years since both in actions of foreclosure, and redemption, in Ontario, the Court has been authorized to give complete relief in the action, including the right to order delivery of possession of the lands in question.

Both redemption and foreclosure actions being "actions to recover land," why should they be subject to any other period of limitation than any other actions to recover lands? Bacon, V-C., in *Forster* v. *Patterson*, L.R. 17 Ch. D. 132, suggested that it might be out of legislative sympathy for mortgagees that the disability clauses were not applied to redemption actions; but even if the suggestion were well founded in fact, it is ill founded in reason;

and we think the Provincial Legislature would do well at its next session to amend s. 40 of the Limitations Act by inserting the words "or to redeem, mortgaged lands, or enforce payment of money charged on lands."

But if the case of *Smith* v. *Darling* is an unsatisfactory decision what are we to say to *Martin* v. *Evans*, 39 O.L.R. 479, where, after twenty years delay, a judgment and final order of foreclosure were set aside; and the pendency of the action of foreclosure was held to save the right of the defendants to redeem the mortgaged lands?

The facts of that case were certainly peculiar and the proceedings appear to have been conducted with a strange disregard of the practice of the Court, and yet where a defendant seeks relief against proceedings the usual rule is "*vigilantibus non dormientibus æquitas subveniat*," but in this case a defendant's slumber of twenty years was held not to be sufficiently prolonged to disentitle him to set aside the proceedings of which he complained. It must, of course, be borne in mind that part of the mortgaged property, in respect to which the defendant claimed the right to redeem, was originally a reversionary interest which had only recently fallen into possession; which fact seems to have aroused the sleeping defendant to activity.

CONSCIENTIOUS OBJECTORS AND PACIFISTS.

Those persons of the above named classes who have consciences are entitled to fair treatment. This they do not always get, for the simple reason that the great majority of "conscientious objectors" are conscienceless shirkers; and the former have to suffer for being in bad company. If one of these objectors is prepared to serve in some capacity, however menial, and is prepared to take the same pay for doing it as a private in the ranks, he should not be compelled to engage in actual warfare. On the other hand, an objector who claims exemption, but declines to submit to such reasonable conditions as may be imposed, would very properly be compelled to don khaki and get to work in the trenches.

Those who have the adjudication of such cases have a difficult task to perform, but the above suggestion is the only one that seems to meet the case. The appropriate remedy, however, can only be had by legislation, but in this country there is no Parliament at present to enact it. It is said that in England the appropriate remedy will shortly be applied.

Some time ago *The Spectator* published a letter on this subject, in which the writer took the ground that any person claiming exemption on account of conscientious scruples against fighting or taking life, and thereby refusing to defend the country which protects him, is not entitled to the protection, benefits and privileges accorded to those who were prepared to defend their liberties. The strongest and best statement which we have seen on the subject curiously enough appears in a leading article in *The Christian*, the most prominent religious paper of England. The writer demands that those who thus refuse to bear the burden of citizenship should not only be disfranchised but should also be deprived of all protection from the law; that they are, in fact, "outlaws," using the term in its original sense. Being outside the law they cannot claim its benefits—they have logically and reasonably no right to claim protection against personal injury; and have no right therefore to appear as litigants in the courts, either as plaintiff or defendant. If they are really conscientious in their objections and are gifted with ordinary common sense they must see the reasonableness of this proposition.

It is time that all those who live in a country, and claim the protection and enjoy the privileges of citizenship, should in this matter and in all others of a cognate character realize their responsibility as well as their privileges.

The law is that those who "be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere" (25 Edw. III., ch. 2), are guilty of high treason; and it will be remembered that a prominent citizen of the Empire was recently hung for a breach of the above statute. There are those in this country who have transgressed this statute, but have not suffered the fate of Sir Roger Casement. It is just as well, however, that they should be reminded that this old statute is still in force.

Our cotemporary, the *Law Times* (Eng.), refers to this subject as follows:—

"The debate in the House of Lords on Wednesday last will do much to clear the air of a lot of cant that has been current recently with regard to the punishments awarded to those persons who refuse to perform any military or national service. The true conscientious objectors are few in number, and may be described as those persons who hold genuine convictions based on religious or moral grounds. With these misguided people a certain amount of sympathy may be felt, and any vindictiveness towards them should be deprecated. By far the greater number of those who are now undergoing punishment are not conscientious objectors at all, but may be classed as objectors to military or national service on political, social, or personal grounds. To these persons no leniency whatever should be shewn, and we are glad to see that for the future punishments awarded by courts-martial are to stand, and there will be no successive punishments. The tribunals—local, appeal, and central—have done good work separating the sheep from the goats, and very few mistakes as to category have occurred."

There is another class in the community which requires prompt and effective treatment from time to time. Pacifists happily are neither a large nor an influential body. Their vaporings, however, in such times as these are harmful, as well as disloyal. It is when such men as Lord Lansdowne, who has occupied most prominent positions in the councils and government of the Empire, writes as he has done that this subject comes prominently before us. It may be, as has been suggested, that his intellectual powers are waning, or that he has come under baneful influences; but, however that may be, he and others who speak as he has done are at least anti-British, and to that extent "give aid and comfort to the King's enemies." It will be remembered by some that when the Marquis of Lansdowne was Secretary of State for War, previous to the South African War, he did not even take the trouble to open reports sent him officially by the Director of Military Intelligence, which would have given much valuable information as to the doings of the Boers in their preparations, resulting in the British suffering great harm and loss, a result which will also follow more or less from his recent utterances.

It is said that the British Government will shortly take strong measures to prevent the promulgation of peace propogandas. This may be an interference with what we call the right of free speech, but under some circumstances and when the Empire is fighting for its life, free speech is sometimes veiled treason.

Those who have followed the career of Lord Lansdowne will not be much impressed by his foolish and mischievous utterances. Things are soon forgotten, but the record of the finding of the Royal Commission to enquire into the military preparation for the war in South Africa so damaged his reputation that his views on any subject connected with either peace or war are of little consequence. The finding of this Commission, on which sat some of the very best men of the Empire, was a damning verdict of ignorance, incapacity and wilfull blindness on the part of those who at that time were at the head of the British Government. Lord Milner was probably the principal offender. But the man most culpable from the official military standpoint was the Secretary of State for War, Lord Lansdowne. His culpability was that, being officially responsible for the sufficiency and efficiency of the military forces of the Empire, he allowed its armaments to become so grossly insufficient that three months of war with two small republics emptied our arsenals—that he was guilty of criminal negligence in omitting to inform himself of or to listen to the elaborate information supplied to him by the Military Intelligence Department, notwithstanding the repeated warnings of his military advisers, with the result that it was not until three weeks before the outbreak of war that he awoke to the fact that the Orange Free State was about to take the field against us—that although on September 5th he became convinced that war was inevitable he not only made no preparation to meet the Boer attack for seventeen days, but actually on September 16th cancelled an order for 1,000 mules which were urgently needed for transport purposes—that he took no adequate measure to provide reinforcements and discouraged every proposal made by volunteers to strengthen our forces in South Africa until after our three-fold defeat in December—that he in effect caused the retirement of one of England's most valued and brilliant

officers, the Director of Military Intelligence, Major-General Sir John Ardagh, leaving him under the stigma of having neglected his duties, although he had in his own possession evidence which proved the opposite and that he and not his subordinates was to blame.

The finding of the Commission was in effect that the only men who did their duty faithfully and well were Sir John Ardagh, his colleague Major Altham, and Gen. W. F. Butler. All the rest, including Lord Salisbury, Lord Milner, Lord Lansdowne, Joseph Chamberlain, Mr. Balfour, etc., were more or less severely criticised. Of Sir John Ardagh and his colleague it was said that the thanks of Parliament were due to them for their services and that they were entitled to a formal expression of regret that their good work should have been so shamefully misrepresented, and themselves cruelly calumniated by the conduct of their chief whom they had so loyally and faithfully served.

This is the man who now presumes to tell those who are directing the affairs of the Empire and those who are fighting its battles that they should revise their views as to a continuance of the war. His criminal negligence at the time of the Boer war is now supplemented by his "giving aid and comfort to the King's enemies" by suggesting peace and thereby discouraging and hindering those who are bravely and loyally struggling to uphold the right against the vilest tyranny and savagery that the world has ever seen.

THE DUCHESS OF KINGSTON'S CASE.

There are some litigants who attain a sort of legal immortality by reason of cases in which they may happen to have been concerned being always quoted by their names. For instance, there is our old friend "Taltarum" with whose case we have had a friendly acquaintance ever since we began to explore the mysteries of the law of real estate. There is the immortal "Shelley," not by any means the poet of that name, but he whose "case" is discussed in so many pages of our law reports, not to speak of many other individuals whose cases are "as familiar in our mouths as house-

hold words." Not the least well known of these legal immortals is "the Duchess of Kingston" a frail beauty of the days when George the Second and George the Third were Kings. "The Duchess of Kingston's case" is to be found among Smith's Leading Cases, and it is reported at length in 20 State Trials, p. 355; but probably not very many of those who find the case quoted as authority take the trouble to find out what was the nature of this *cause celèbre*. If they were to do so they would find it really more entertaining than many a novel; and because we believe its particulars are not very generally known we think it worth while to give some account of it.

It is interesting not only for the various questions of law raised in the course of the trial, but also for the romantic incidents which gave rise to the prosecution, because the case was a prosecution before the Peers for bigamy, or polygamy as it is styled in the Royal Commission directing the trial.

One peculiarity about the case is this, that the accused was found guilty and therefore she was not in fact "the Duchess of Kingston," and the case which has been quoted so oft as "the Duchess of Kingston's case" was not really the Duchess of Kingston's, but the Countess of Bristol's.

The case illustrates the loose state of the marriage laws in the time of George II. The heroine of the case was born Elizabeth Chudleigh and at the time of her first marriage she was a maid of honour to the Princess Royal. In the month of June, 1744, she met the Hon. Augustus John Harvey at the Winchester races, he being then a youth of seventeen, and in the Naval service, Miss Chudleigh was then eighteen and she was on a visit at a place near by called Lainston, where her aunt, a Mrs. Hamner, was staying. Lainston was a diminutive parish. It consisted of the house in which Miss Chudleigh was staying and a church which was in the garden of the house. Mr. Harvey visited Miss Chudleigh at this house, and a secret marriage between them was agreed on, and the Rev. Mr. Ames, the parson of Lainston, agreed to solemnize it. About eleven o'clock at night the bridal pair, accompanied by the aunt, Mrs. Hamner, and two gentlemen went to the church in the garden, and the marriage was solemnized

by the light of a candle carried in the hat of one of the gentlemen. Besides the parties above mentioned, a confidential servant named Ann Cradock was present, she being charged to take care that none of the other servants should have any notice of what was going on. Why it was that the marriage was to be kept secret does not clearly appear. It is alleged because of certain circumstances in Mr. Harvey's family; the tender years of the bridegroom and his inability to maintain his bride, and the probable unwillingness of the latter to forfeit the post she held as maid of honour, may also have had weight in determining to keep the marriage secret. The union resulted in the birth in 1746 of a son, who, however, shortly afterwards died in infancy. This fact also was kept secret from all but a few persons. Thereafter a coolness arose between the parties, and they ceased all cohabitation, the lady continuing to pose as a spinster. In 1759, after she had been living separate from her husband about twelve years, the eldest son of the Earl of Bristol having died, the lady's husband became heir apparent to his father with the immediate possibility of succeeding to the peerage, as his father was ill. His wife then bethought her that, in case such an event happened, it might be desirable to have some authentic record of her marriage She accordingly proceeded to Winchester where Mr. Ames then lived, and found him, on what proved to be his death bed. A book was procured and an entry of the marriage was made by him therein. This book was sealed up and left with a friend of the lady, to be guarded as a secret not to be disclosed unless required by the lady. The person with whom it was deposited, however, died and the book was found after his death by a member of his family, and being apparently a parish register was forthwith handed over to the rector of the parish of Lainston, in whose custody it subsequently remained, and proved eventually a part of the evidence for the prosecution. The Earl of Bristol having recovered his health, the prospect of the husband's succession to the title became more remote, and the Duke of Kingston having become enamoured of the lady she seems to have resolved that the attractions of a ducal coronet were superior to those of an earl's. In the "*National Biography*" it is said she became the Duke's

mistress; at all events her husband threatened her with a suit for divorce, and intimated that she should assist him in getting a decree in the Ecclesiastical Court, with a view to his ultimately getting an Act of Parliament dissolving the marriage. This she indignantly refused to do; but as both parties were really desirous of getting rid of the marriage, it was thought by the legal advisers of the lady that the desired result might be attained by a suit for jactitation of marriage, which the lady should bring against her husband. This suit was accordingly brought, and not very strenuously defended by the husband, and, for lack of proof of any valid marriage having taken place, a decree was pronounced in the lady's favour. She appears to have been advised that she might now safely marry the Duke who was anxious to marry her, though he declined to do so until the doubts as to the first marriage were set at rest. The Duke it appears was cognizant of the proceedings in the jactitation suit, and took a warm interest therein, and shortly after the decree was pronounecd went through a form of marriage with the lady. During his lifetime no question was raised as to the validity of this pretended marriage, but after his death his nephew, who was his heir at law, instituted proceedings in Chancery, and also a criminal prosecution for bigamy against the lady. She claimed a right to be tried for the alleged crime by her peers, and as, even if she was not the Duchess of Kingston, she must have been the Countess of Bristol, for by this time her husband had succeeded to the title, it is clear her claim was well founded, and was acceded to; and a Royal Commission was issued for her trial before the Peers in the Court of of the Lord High Steward. Accordingly, on the 15 April, 1776, the trial began. The stately ceremony which marked the proceedings is duly recorded in the pages of the State Trials and the names of the numerous peers who took part in the trial are to be found on p. 623. The prosecution was led by Attorney-General Thurlow (afterwards a Lord Chancellor). The judges of the Common Law Courts were in attendance. Lords Mansfield and Camden took part, but whether in their capacity as peers, or as common law judges is not clear, possibly there were there in both capacities. Lord Camden certainly spoke for the judges on the

questions of law submitted to them. At all events there was a great array of legal talent both at the bar and among the peers, and it is for that reason that the conclusions of their Lordships on the various legal points arising in the course of the trial constitute such high authority.

The case was remarkable for the singular step taken *in limine* by the prisoner at the bar. After the reading of the indictment, to which she pleaded "not guilty" and claimed to be tried "By God and my peers," and before the case was opened by counsel for the Crown, she claimed the right to put in evidence the decree in the jactitation suit, which she claimed constituted a bar to the prosecution. This point was argued at some length by counsel, but was disallowed. The evidence was then called, the record of the marriage which the prisoner had herself procured to be made was read against her, and Ann Cradock, the confidential servant, testified to the fact of the marriage: all other eye-witnesses being then dead. In the course of the trial several questions of law arose. (1) As to the effect of a judgment in a suit for jactitation of marriage. How far, if at all, it is conclusive.—How far, if at all, it may be controverted. The points decided have a wide reaching effect on the law of evidence. It was held that the judgment in question was not conclusive, and, even if it were conclusive between the parties, it would not be so as against the Crown, or a third party. (2) Then there was the claim of the surgeon who had witnessed the birth of the child, that he should not be required to disclose facts learned by him professionally to the prejudice of his patient, which was disallowed. (3) The claim of a noble lord that he should be excused from answering as to private and confidential statements made to him by the accused, which was also disallowed. (4) The claim of a solicitor of the Earl of Bristol to be excused from disclosing what he had learned from Ann Cradock when he was making investigations on behalf of the Earl in the jactitation proceedings, which was also overruled as the fact in question was not "a secret of his client."

But the case is also interesting for the light it throws upon that extraordinary method devised by our ancestors for alleviating the savagery of the former criminal law of England, and known as "benefit of clergy."

Benefit of clergy was something like the well known dog law, that a dog is entitled to have one bite, because, according to this privilege accorded to certain criminals, they might commit one felony with practical impunity. This privilege by a singular inconsistency was accorded to the literate members of the community, who by reason of their superior intelligence ought to know better than to commit crimes, while it was denied to the most ignorant who had more excuse for falling into crime. The capacity to read however was the sole condition required to constitute the criminal "a clerk" and thus entitled to claim the benefit of clergy. For many felonies, bigamy included, benefit of clergy was claimable by the convict. But here again the old English criminal law made a further distinction in criminals. Commoners who claimed the benefit were to be burnt with a hot iron in the presence of the court "on the brawn of the thumb" with the letter M in case of murder, and with the letter T for any other offence, and were further subject to imprisonment for a period in the discretion of the court not exceeding a year; but (as their Lordships, on the advice of the Common Law judges, found in the Duchess of Kingston's case) a peer and a peeress were exempt both from burning in the hand, and also from imprisonment. The result of this celebrated trial was therefore somewhat lame and impotent, for, although the culprit was found guilty of the offence charged yet, by reason of the privilege above referred to, the sentence of the court was "Madame, you are discharged, paying your fees."

The marriage in question appears to have been solemnized without the prior publication of banns, and it was not till 18 years after the marriage in question in this case that the law was, by 26 Geo. II. c. 33, amended so as to invalidate marriages so solemnized. At the time the marriage took place it was the law according to the Book of Common Prayer that banns of marriage should be published, and the book of Common Prayer was then and still is a schedule to an Act of Parliament, but at that time a marriage otherwise valid could not be declared null merely for the omission of the publication of banns and here we may remark that the 26 Geo. II. c. 33, though repealed by the Imperial Stat., 4 Geo. IV.

c. 76, would probably be held to be still in force in Ontario, and by that statute a parson, solemnizing a marriage as Mr. Ames solemnized Miss Chudleigh's marriage with Mr. Harvey, would be guilty of a felony. The Ontario Marriage Act (R.S.O. c. 148) requires that either a licence or banns should precede a marriage, but it does not expressly invalidate marriages solemnized without either of those preliminaries. That a marriage without banns, and without license, would be null and void therefore is by no means clear; having regard to the Duchess of Kingston's case, we are inclined to think it would not in Ontario.

How it may be in other parts of the Dominion we are not able to say; but on this point as on all others connected with marriage there, ought to be a uniform law throughout the Dominion. It ought not to be possible for a marriage to be null and void in one Province and valid in another. But in order intelligently to deal with the subject of marriage, the legislator needs to be fully informed both as to the religious and temporal aspects of the subject to be dealt with, and to be able clearly to distinguish between those fundamental principles which all Christians admit, and those which are merely the ecclesiastical rules of some particular part of the Christian fold, and have not, and ought not to have, any universal application.

NOTES FROM THE ENGLISH INNS OF COURT.

The Unwritten Law.

Lawyers throughout the Empire will have read with some concern the report of a recent case at the Old Bailey in which an officer was acquitted on a charge of murder. It is difficult to say what the defence really was. The accused came home to find that his wife was being bothered by another man whose character was none of the best. He went to chastise the offender with a heavy whip. There was a scuffle, in the course of which the lady's lover was killed. The crime was murder or nothing. The prisoner, who was defended by Sir John Simon, gave no

evidence on his own behalf. Counsel for the Crown contended before the jury that in law there was no answer to the charge. The deceased man had not been caught *flagrante delicto;* there was no evidence that the accused had acted in self defence. The learned judge, too, drew attention (as he lawfully might) to the fact that the prisoner had not denied the charge on oath and he also spoke of the dangerous precedent which would be created if the prisoner acted upon any unwritten law. Yet the jury acquitted the prisoner. They feared, possibly, that a verdict of guilty even with a recommendation to mercy which would certainly have been accorded by the King, might have lost the prisoner his commission.

The Law Officer's Right of Reply.

This case has drawn attention to a peculiarity of criminal procedure in England. Had one or other of the Law Officers attended in person he could have exercised the right of reply. In other words, the prosecution would have had the last word with the jury. But it is extremely doubtful whether even Sir Frederick Smith at his best could have done anything to prevent the jury doing what they did. And who can blame them? A man who annoys the wife of another man who is serving at the front is not likely to get much sympathy. The maxim *inter arma silent leges* may, however unconsciously, have influenced the minds of the jurors. As to the Law Officer's right of reply, this still exists notwithstanding the Criminal Evidence Act. Sir Edward Clarke, who was once Solicitor-General, has often contended for its abrogation, but many great law officers have said that its occasional exercise is essential to the administration of justice.

Mr. Birrell, M.P.

The Rt. Hon. Augustine Birrell, M.P., has informed his constituents that he does not intend to seek re-election in the new Parliament when the time comes for that body to be called into existence. Mr. Birrell is a man of many attainments. He

may be variously described as lawyer, politician, or library genius. His career as politician scarcely invites comment in these pages; but it is fair to say this. After the unhappy disturbances in Dublin—my native city—Mr. Birrell who had been Chief Secretary for Ireland, tendered his resignation which was accepted. His *apologia* which was heard in the House of Commons on May 3, 1916, was worthy of the man. He took the whole blame for everything upon himself. Yet in the light of subsequent events it is fairly obvious that in all that he did and seemed to leave undone he was but carrying out a policy settled by others—his masters—a policy of attempted conciliation which has been and still is being practised in Ireland. As to whether it will succeed time will show. In the meantime let us reserve judgment upon one of those who was ordained to practise it. Having said this much, let us leave him as politician, only to wait upon him once more as lawyer and man of letters.

Mr. Birrell, K.C.

Mr. Birrell was for many years at the Chancery Bar. He is a lawyer of no means attainments. He might have achieved a greater success had he not been lured into politics—had he confined his literary efforts to deeds and pleadings. But the law is a jealous mistress. "Among lawyers" he has been heard to say with some pathos, "I am a literary man." Among literary men "I am spoken of, with bated breath, as a lawyer!"

The present writer, having read most of his works, can certainly claim to be one of the lawyers here mentioned; and even if the lawyer is not, ordinarily speaking, of a literary turn he will find much amongst Mr. Birrell's essays to fascinate and engross his attention. For this author has by no means confined himself to writing essays on literary subjects. Nor is he merely—though he may be largely—a critic in the ordinary sense. He has struck out a line of his own. He wanders along paths where law and literature meet. He explores regions into which your literary genius dare not venture. Here he is unrivalled. "A literary man" wrote Dr. Johnson "should always have lawyers to converse with!" In Mr. Birrell's case there was no need.

Some of His Legal Writings.

It is true that of his purely legal writings those best known first came into being as lectures. A book on "*The Powers and Duties of Trustees*" may now be found in the law library. Birrell gave lectures on this subject to the students of the Inns of Court, and these were subsequently published. They are fascinating reading. They abound in that whimsical humour for which their author is famous. It used to be said that in the course of them he told the students: "One of the chief functions of a trustee is to commit judicious breaches of trust." But I have been unable to find this *dictum* on the printed page. On another occasion he lectured on "*Changes in Equity procedure and principles in the 19th century.*"

This was one of a series of lectures delivered by various experts at the beginning of the present century. They were all published in book form *sub nomine* "*A Century of Law Reform.*" Mr. Birrell's lecture will there be found. His description of the old Chancery proceedings is magnificent. He once wrote an essay on "*Contempt of Court*" being a review of a work on that subject in which he points out what is indeed known to most lawyers that it is a contempt to assault a process server. He then goes on: "How necessary it is to protect the humble officer of the law who serves writs and subpœnas is proved by the case of one Johns, who was rightly committed to the Fleet in 1772, it appearing by affidavit that he had compelled the poor wretch who sought to serve him with a subpœna to devour both the parchment and the wax seal of the court and had then, after kicking him so savagely as to make him insensible, ordered his body to be cast into the river." An essay on "*Contempt of Court*" may be found in the volume entitled "*In the Name of the Bodleian.*" His partial definition of "Contempt" is worth reading:

"An ill disposed person," he writes, "may exhibit contempt of court in divers ways—for example, he may scandalize the court itself, which may be done not merely by the extreme measure of hurling missiles at the presiding judge or loudly contemning his learning or authority, but by ostentatiously reading a newspaper in his presence or laughing uproariously at a joke made by somebody else."

In this volume, too, may be found another piece in which he was discussing a recent Act of Parliament which had deprived certain persons of valuable property. He treats of title, and says: "There is no other way of holding property than by legal title. Sometimes that title has been created by an Act of Parliament, and sometimes it is a title recognised by the general laws and customs of the realm, but a legal title it has got to be. Titles are never matters of rhetoric, nor are they *jure divino*, or conferred in answer to prayer; they are strictly legal matters, and it is the very particular business of courts of law, when properly invoked, to recognise and enforce them."

Miscellaneous Legal References.

The lawyer who reads Birrell will find more in him to amuse and interest than any casual reader. Scattered up and down through his writings are to be found numerous passages which appeal at once to the legal mind. Indeed, the very sentences, the words and language used, though never dull are redolent of law. As a last quotation, let me give a description of the calling of a barrister-at-law, which is taken from the essay "Of Actors." After mentioning a celebrated actor who had wished to be a member of the legal profession, Mr. Birrell goes on: "He did not like his children to come and see him act, and was always regretting—heaven help him! that he wasn't a barrister-at-law. Look on this picture and on that! Here we have Macbeth, that mighty thane; Hamlet, the intellectual symbol of the whole world of modern thought; Strafford in Robert Browning's fine play; splendid dresses, crowded threatres, beautiful women, royal audiences; and on the other side, a rusty gown, a musty wig, a fusty court, a deaf judge, an indifferent jury, a dispute about a bill of lading, and ten guineas on your brief—which you have not been paid, and which you can't recover—why, ''tis Hyperion to a satyr!'"

LIABILITY OF HOUSEHOLDERS FOR INJURIES TO INVITEES.

An interesting case was recently before Mr. Justice Bailhache, raising questions which might readily arise at any time, touching the liability of any one of us for damage caused to some person coming to our house who suffers some injury through the state of our premises. The case deals with the position of the householder where a tradesman or other person, lawfully upon the premises with the permission of the householder, meets with some unexpected accident through some unknown defect in the state of the premises. It is the sort of question which might face a householder at any moment. There are a number of authorities which deal with the point, and we propose in this article to examine the position in the light of these authorities, and incidentally to point out the significance of the recent case to which we have referred.

In the first place, we find that there is a duty owed by those in possession of the premises to those who come lawfully on to the premises. This duty can hardly be said to be thrown on the occupier of premises by the general law of negligence. It is hard, no doubt, to find the true basis of the ground. The case which we are discussing must be distinguished from the case of a person erecting a building for profit and inviting persons to make use of the building in consideration of the payment of money. The case of *Francis* v. *Cockrell*, 23 L.T. Rep. 466, L. Rep. 5 Q.B. 501, stands half-way between the two. There the committee of certain steeplechases, held yearly at Cheltenham, caused a stand to be erected to enable people to view the races. The stand had been so erected yearly for some past years. But on this occasion the stand collapsed and injured the plaintiff, who brought an action against one of the persons interested in getting up the races, and who had on behalf of himself and others employed a good firm of contractors to carry out the erection of the stand. Except, apparently, that the moneys received from those making use of the stand and from letting the refreshment room in the stand building were paid into the race fund for the general benefit of the

races, the defendant had no pecuniary interest in the money received from the stand. The Court, however, held that the plaintiff could maintain an action.

In the last-mentioned case the Court clearly felt some difficulty in defining the precise ground on which the action could be maintained. Chief Baron Kelly, although stating that there was clearly no express contract between the parties, took the view that there was an implied contract. He held that it was immaterial for what purpose the money was paid, and considered it sufficient that the defendant, having possessed himself of the stand, impliedly promised that the defendant, having paid his entrance money, should have a seat on the stand during the steeplechase. His Lordship held that the general proposition of law that where a man engages to supply another with a particular thing for a pecuniary consideration, he impliedly contracts that the thing is fit for the purpose, applied to the case before the Court, subject only to this qualification, that he did not contract against defects in the thing not only not known to the person contracting, but undiscoverable by the exercise of reasonable skill and diligence or by any ordinary and reasonable means of inquiry and examination. The judgment of Baron Martin was much to the same effect. Baron Channell, however, remarked that had the defendant built the stand for his own profit the case would have been quite clear. On the authorities his Lordship thought that the fact that he got no individual benefit from the money made no difference. Mr. Justice Montague Smith considered that a contract of this kind threw a duty on the defendant, and that the defendant had in effect promised that due care and skill had been used in the construction of the stand. But his Lordship thought that the obligation could be put in another way—namely, that there was an implied promise that the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so. Negligence having been found on the part of those who had constructed the stand, his Lordship was of opinion that the defendant was liable for that negligence.

We have taken the case of *Francis* v. *Cockrell* (*sup.*) as our

commencing point, for it illustrates the difficulty of arriving at the true ground for saddling the responsibility for an accident to a person making use of another's premises with the permission of that other person. In that case it was regarded as founded on contract. Now let us see if this be the true ground where there is no consideration passing. In an Irish case—*Sullivan* v. *Waters* (14 Ir. C.L.R. 460)—Lord Chief Baron Pigot, who fully examined the law as it then stood, expressed himself unable to ascertain and lay down any satisfactory general rule. But in an earlier case —*Quarman* v. *Burnett* (6 M. & W. 499)—Baron Parke in delivering the judgment of the court observed that the rule of law might be that where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and his Lordship observed that such injuries are nuisances.

We now come to the most important case of all—*Indermaur* v. *Dames* (14 L.T. Rep. 484; L. Rep. 1 C.P. 274)—where the law was carefully considered. The facts in that case may be briefly stated as follows: The premises of the defendant, who was a sugar refiner, consisted of a building adapted to the ordinary uses of the trade. Incidentally there was a shoot or hole in the floors of the building through which sugar was lowered or raised as occasion required. When not so used, the hole served as a means of ventilation. Apparently the light on the premises was necessarily subdued. The plaintiff was a journeyman fitter employed by a patentee who had fixed a patent gas regulator upon the premises. Part of the contract between the patentee and the defendant involved the testing of the gas jets in the building, and it was in the course of this work that the plaintiff fell through the hole and was injured. The court found that there was evidence of neglect on the part of the defendant and, in effect, that the defendant had not taken reasonable care to prevent an accident of the kind, and in such circumstances, arising.

The main point brought out by the court in the last-mentioned case was the distinction between the rights of a mere licensee upon another's premises and the rights of a person who is in effect on the premises in the course of business. This distinction had from

time to time been drawn in previous cases. Thus Baron Alderson in the case of *Southcote* v. *Stanley* (1856, 1 H. & N. 247) laid it down in the course of the argument that there is a distinction between persons who come on business and those who come on invitation. While Baron Bramwell in the course of his judgment said that if a person asked a visitor to stop at his house and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, the latter could maintain no action. Again in the case of *Chapman* v. *Rothwell* (1858, E.B. & E. 168) Mr. Justice Erle remarked that there was a distinction between a visitor who must take care of himself and a customer who as one of the public is invited for the purpose of business carried on by the defendant.

In *Indermaur* v. *Dames* (*sup.*) Mr. Justice Willes in delivering the judgment of the Court of Common Pleas dealt with the position of a person who resorts to the premises in course of business. His Lordship said that a customer was only one of a general class of persons coming to premises by the invitation express or implied of the occupier. The learned judge laid it down that members of this class are entitled to protection from danger, and are entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know, such as a trapdoor left open, unfenced, or unlighted. Taking the instances of a customer at a shop, his Lordship said: "This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns him; and if a customer were, after buying goods, to go back to the shop in order to complain of their quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit."

The judgment in the last-mentioned case is important in that it in the first place distinguished the two classes of persons coming to the premises, in the second place defined more clearly than

heretofore the exact class of person entitled to what we may call the higher degree of protection, and in the third place defined the nature or degree of protection. As to the first point, the distinction was drawn in the judgment of the court between mere visitors or volunteers resorting to the premises on the one hand, and on the other hand persons who go, not as mere volunteers or licensees or guests, but who go upon business which concerns the occupier, and upon his invitation express or implied. As to the second point, the persons who are entitled to the higher degree of protection sufficiently appear from the distinction so drawn. As to the third point, the court considered it settled law that a person, going to the premises upon the invitation express or implied of the occupier, if using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know.

The case of the owner of premises let as flats who fails to keep the common staircase in a proper state of repair and free from danger, and who may thereby become liable to persons using the staircase at the invitation express or implied of a tenant, may be here mentioned. But it appears to us that although cases of this kind are often cited in support of the general doctrine laid down in *Indermaur* v. *Dames* (*sup.*), these cases very readily obscure the true nature of the doctrine, for the fact of letting premises with a common staircase raises a different relationship in point of law. However, the case of *Miller* v. *Hancock* (69 L.T. Rep. 214; (1893) 2 Q.B. 177) may be cited here. In that case the court held that there was an implied obligation upon the owner of the premises to keep the staircase in repair, and that the ordinary rule of easement law that he who owns the easement must do the necessary repairs for the enjoyment of the easement did not apply.

There is one type of case which, although connected with the duties of occupiers of premises towards other persons, we do not intend to deal with. This is the case of injury to passers-by, who, through some defect of the premises, are injured, not as invitees, but as mere members of the public using the highway adjoining the premises. Although these highway cases stand on a peculiar

footing, we may mention here the case of *Tarry* v. *Ashton* (34 L.T. Rep. 97; 1 Q.B. Div. 314). The facts in that case may be briefly stated as follows: The defendant occupied a house from the front of which a large lamp hung over the highway. The lamp fell on the plaintiff and injured her while making use of the highway. The lamp was out of repair through decay, but this was not, as the jury found, known to the defendant. The fall was caused by the fall of the man who was working at the lamp. His ladder slipped owing to the wet and windy weather, and to save himself he clung to the lamp. The fastening of the lamp to the premises was, on examination after the accident, found to be in a decayed state. This man was employed by the defendant for the purpose of blowing water out of the gas pipes. The court held that the defendant was liable.

In the recent case of *Pritchard* v. *Peto* ((1917) 2 K.B. 173), which is the case we referred to in the opening lines of this article, the plaintiff was an "invitee." He was on the doorstep of the premises, and when there a piece of the cornice from the top of the house fell on him, injuring him. It was admitted by him that the house was in apparently good repair, and that the defendant, the occupier, did not know of the defect in the cornice. The defect was an old one due to the action of the weather upon the cement. The learned judge—Mr. Justice Bailhache—held that the defendant owed the same duty to the plaintiff as was owed to the plaintiff in *Indermaur* v. *Dames* (*sup.*), which was quite a different duty to that owed by the defendant to the plaintiff in *Tarry* v. *Ashton* (*sup.*). But his Lordship pointed out that it was necessary to show that the defendant was or ought to have been aware of the decay of the cornice, whereas it was admitted that she was ignorant of it, and it was not shown that the fact of her ignorance was due to neglect of some reasonable precaution. In the circumstances the plaintiff failed in the action.

In these days, when it is hard to get repairs, even of the most urgent kind, effected, householders can but feel some anxiety about the state of their premises, and, in particular, whether that state of disrepair will not lead to some accident to those upon their premises as "invitees." In the recent case, however, to which we have just referred the latent defect does not appear to

have been in any way due to the war. How far war circumstances would be an element in deciding the question of negligence in such cases has yet to be determined.—*Law Times.*

SEIZURE OF GERMAN-OWNED PROPERTY.

The Trading-with-the-enemy Act of the United States provides for the appointment "of an official known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy," etc.

Acting under this statute the President by executive order of October 12, 1917, empowered the alien property custodian "to require the conveyance, transfer, assignment, delivery or payment to himself, at such time and in such manner as he shall perscribe, of any money or other properties owing or belonging to or held for, by or on account of, or on behalf of, or for the benefit of any enemy or ally of an enemy, not holding a license granted under the provisions of the Trading-with-the-enemy Act, which, after investigation, said alien-property custodian shall determine is so owing, or so belongs, or is so held."

Provision is made for the payment to the alien-property custodian of any indebetedness owing to an alien enemy or for the delivery to him of any property belonging to such enemy, even though such payment or delivery may not be mandatory under the terms of the Act.

The property to be seized under the legislation to which we are referring is captured not as booty of war, but to prevent it from being used for purposes of hostility against the United States.—*Case and Comment.*

An adult daughter who is a competent automobile driver, in taking a car in which her father has a partnership interest for business purposes, with his implied consent, for a pleasure trip on which her mother accompanies her, is held not to be the servant of her father, in *Woods v. Clements*, L.R.A. 1917E, 357, so as to render him liable for an injury inflicted by her negligence upon a traveler on the highway.

REVIEW OF CURRENT ENGLISH CASES.

(*Registered in accordance with the Copyright Act.*)

SHIP — CHARTERPARTY — BILL OF LADING — CONSTRUCTION — CONDITION IN CHARTERPARTY THAT BILL OF LADING TO BE "CONCLUSIVE PROOF OF CARGO SHIPPED"—INCORPORATION OF CONDITIONS OF CHARTERPARTY IN BILL OF LADING.

Hogarth Shipping Co. v. *Blyth* (1917) 2 K.B. 534. This case turns upon the construction of a bill of lading. The bill of lading in question was for a specified number of bags of sugar, but it was qualified by the words "weight measure quality contents and value unknown" but it also contained the words "freight and all other conditions and exceptions as per charterparty." The charterparty contained the following clause "The Captain to sign eastern trade bills of lading which are to be deemed to be conclusive proof of cargo shipped, and their conditions to form part of this charterparty." At the port of discharge there was a shortage in the number of bags, but evidence was given that all the bags placed on board had been delivered. The question was then raised whether such evidence was admissible in the circumstances. Lush, J., on a case stated by arbitrators, thought that the conclusive clause in the charterparty was incorporated in the bill of lading, but it was conclusive only as to the number of bags but not as to their contents, and that it was open to the shipowners to shew that they had delivered all the sugar put on board. The Court of Appeal (Eady, and Scrutton, L.JJ., and Bray, J.), came to the conclusion that the conclusive clause in the charterparty was not incorporated at all in the bill of lading, because it was inconsistent with the express terms of the bill of lading, which stated that "weight measure quality contents and value unknown," Scrutton, L.J., and Bray, J., were of the opinion that the only conditions of the charterparty incorporated in the bill of lading were such, if any, as were to be performed by the consignee, including therein obligations on the shipowner, qualifying or relevant to such conditions. It may be observed that the appeal from Lush, J., was dismissed, but that learned Judge held that the shipowners were liable for the value of the missing bags, but not for their alleged contents, and all the judges of appeal consider that the shipowners were not liable even to that extent, and therefore if there had been a cross-appeal it would have been allowed.

ARBITRATION—POWER OF ARBITRATOR TO ORDER SECURITY TO BE GIVEN FOR COSTS—ARBITRATION ACT 1889 (52-53 VICT. C. 49) S. 2, 1ST SCHEDULE CLS. (*f*) (*i*)—(R.S.O. c. 65, s. 6, SCHED. A. CLS. (*i*) (*l*).)

In *Re Unione Stearinerie Lauza & Weiner* (1917) 2 K.B. 558. In this matter the simple question was whether or not an arbitrator has under the Arbitration Act, s. 2, and the form of submission set out in the schedule to the Act (see R.S.O. c. 65, s. 6 and sched. A., cls. (*i*) (*l*).) any power to order a party to the reference to give security for the costs of the opposite party. A Divisional Court (Lord Reading, C.J., and Avory, and Shearman, JJ.), decided that he had not that power.

MAINTENANCE OF SUIT—MAINTAINED ACTION SUCCESSFUL—LIABILITY OF MAINTAINER.

Neville v. *London Express Newspapers* (1917) 2 K.B. 564. The Court of Appeal (Eady and Scrutton, L.JJ., and Bray, J.), have dismissed an appeal from Lord Reading, C.J. (1917), 1 K.B. 402 (noted *ante* p. 179), holding that an action for unlawfully maintaining an action will lie against the maintainer, notwithstanding that the action maintained proved to be successful.

LANDLORD AND TENANT—COVENANT BY LESSEE FOR SELF AND ASSIGNS NOT TO SUB-LET WITHOUT LESSOR'S CONSENT—SUB-LEASE—FURTHER SUB-LEASE BY SUB-LESSEE WITHOUT CONSENT—LIABILITY OF LESSEE.

Mackusick v. *Carmichael* (1917) 2 K.B. 581. This was a counterclaim by a lessor against his lessee for breach of covenant by the lessee that he and his assigns would not sub-let the demised premises without the consent of the lessor. The circumstances were that the lessee had sub-let part of the demised premises with the consent of the lessor, and that this sub-lessee had sublet without the leave of the lessor. The question therefore to be determined was whether the sub-lessee was "an assign" of the original lessee within the meaning of the covenant, and Atkin, J., held that she was not.

CHARTERPARTY—DEMURRAGE—ARRIVAL OF SHIP IN OR OFF PORT OF DISCHARGE—CONDITION PRECEDENT TO RUNNING OF LAY DAYS—USELESSNESS OF ARRIVAL.

Owners of S. S. Plata v. *Ford* (1917) 2 K.B. 593. This was an action by shipowners for demurrage. The charterparty provided that the ship should discharge her cargo at a certain rate "time to count twenty-four hours after arrival in or off port

of destination whether berth available or not." Her port of discharge was Havre and in the course of her voyage she received notice that if she went to Havre she would be sent back to Cherbourg, a distance of 75 miles, to await her turn when she could be received at Havre. Accordingly the vessel put in to Cherbourg and remained there several days until she received permission from the French authorities to proceed to Havre. Bailhache, J., on a case stated by an arbitrator held that the lay days did not begin to run until the vessel actually arrived in or off Havre; and the fact that it would have been useless to proceed there sooner than she did did not excuse her arrival at Havre as a condition precedent to the running of lay days.

CHARTERPARTY—TIME CHARTER—HIRE TO CEASE ON LOSS OF SHIP—REQUISITION OF SHIP BY ADMIRALTY—LOSS BY WAR RISKS—RIGHT OF CHARTERERS TO SHARE IN ADMIRALTY COMPENSATION.

London American M. T. Co. v. *Rio de Janerio T. L. & P. Co.* (1917) 2 K.B. 611. This was an action by shipowners to recover the amount due for hire of a vessel under a charterparty. The charterparty was made in 1914, and provided for the use of the vessel by the charterers for a period of eight years, but, if the ship was lost in the meantime, hire was to cease from the day of its loss. The vessel was requisitioned by the Admiralty on the terms that if she was lost by war risks compensation based on her value would be paid. Shortly afterwards the vessel was sunk by the enemy. The defendants the charterers claimed to be entitled to a share of the compensation payable by the Admiralty; and the action was brought to determine whether or not they had any such right, and Rowlatt, J., who tried the action, held that the compensation was in the nature of insurance money, and that the rights of the charterers having ceased the moment the vessel was lost, they had no right to participate in the compensation.

ADMIRALTY—MARITIME LIEN—DISCHARGE OF LIEN BY VOLUNTEERS AFTER SALE OF VESSEL—ACTION IN REM FOR REIMBURSEMENT—DOCTRINE OF SUBROGATION.

The Petone (1917) P. 198. This case involved the consideration of the doctrine of subrogation. The circumstances of the case were briefly as follows: The plaintiff's claim was *in rem* against the *Petone* for wages paid to the master and crew and for disbursements made by the master, which the plaintiffs had paid when acting as agents of former owners of the vessel, in order to effect a sale of it. No assignment had been made to the

plaintiffs of the claims which they thus discharged, and which constituted a maritime lien on the vessel. The vessel was sold, and subsequently re-sold to the defendants. The plaintiffs claimed to be subrogated to the rights of the master and crew in respect of the claims which they had thus paid off: but Hill, J., held on an application to set aside the writ as disclosing no cause of action, that, in the absence of any assignment of the claims of the master and crew, the plaintiffs were not entitled to any lien in respect of the payments they had made, and the writ was accordingly set aside.

PRIZE COURT — TRADING BETWEEN FOREIGN AND BRITISH BRANCHES OF ENEMY FIRM—GOODS TRANSMITTED TO BRANCH IN ENGLAND OF ENEMY FIRM.

The Achilles (1917) P. 218. Evans, P.P.D., in this case held that goods shipped after the outbreak of the war on a British vessel by the Bangkok branch of an Austrian firm, and delivered to the warehouse of the firm in Manchester, were liable to condemnation as prize.

ADMIRALTY — SALVAGE — NEUTRAL VESSEL — CARGO OF MUNITIONS FOR FRENCH GOVERNMENT—ATTACK BY SUBMARINE—SERVICES RENDERED BY BRITISH ARMED TRAWLERS.

The Carrie (1917) P. 224. This was a claim for salvage by the officers and crews of two British armed trawlers. The vessel salved was a Swedish vessel carrying munitions for the French Government. She was stopped by an enemy U-boat and her crew ordered to take to the boats. The submarine was preparing to sink her, when two British armed trawlers appeared, and she desisted. The crew refused to return to the vessel and the trawlers took her in charge and brought her to port. It was contended that in performing this service they were merely performing a public duty in protecting the property of the French Government, but Hill, J., held that such public duty did not extend to the vessel itself, and that the salvage was not only from attack by the enemy, but also, owing to the action of the crew, a salvage from maritime perils and he awarded £750.

COMPANY—MEETING—VOTING BY PROXY—APPOINTMENT OF PROXIES TO BE LODGED TWO DAYS BEFORE MEETING—ADJOURNED MEETING—APPOINTMENTS OF PROXIES LODGED AFTER MEETING BUT BEFORE ADJOURNED MEETING.

McLaren v. *Thomson* (1917) 2 Ch. 261. This was an appeal from the decision of Astbury, J. (1917) 2 Ch. 41 (noted *ante* p. 339), holding that where the articles of a limited company require

the appointments of proxies to be lodged two clear days before the meeting at which the proxies are to act, the article is not complied with by lodging the appointments after the meeting is adjourned and two days before the day to which it is adjourned. The Court of Appeal (Eady, Bankes and Warrington, L.JJ.) agreed with Astbury, J., and dismissed the appeal.

WAR—PATENT OF ALIEN ENEMY—PETITION FOR REVOCATION OF PATENT—APPLICATION TO AMEND PATENT BY DISCLAIMER.

In re Stahlwerk (1917) 2 Ch. 272. This was a petition to revoke a patent of invention. The respondent was an alien enemy and asked that the patent in question might be amended by way of disclaimer. Sargant, J., held that this was by way of defence and therefore the respondent, though an alien enemy, was competent to ask that relief.

COMMISSION AGENT—CONTRACT FOR INDEFINITE PERIOD—DETERMINATION OF CONTRACT—"REPEAT ORDERS"—CONTINUANCE OF COMMISSION AFTER AGENCY TERMINATED.

Levy v. *Goldhill* (1917) 2 Ch. 297. The plaintiff in this case, in the course of travelling for his own business, obtained orders for other traders on terms of commission, and for this purpose the defendant agreed with the plaintiff as follows "I agree to pay you half profits on receipt of orders (provided the customer is good), same applies to repeats on any accounts introduced by you." The defendant subsequently terminated the relation instituted by the agreement, without giving any prior notice of his intention to do so. The plaintiff claimed that the defendant was not entitled to terminate the agreement without notice, and also claimed commission on "repeat" orders received by the defendant after the termination of the agreement. Peterson, J., who tried the action, held that there was no employment of the plaintiff by the defendant in the strict sense, and that the defendant was entitled to terminate their relations without notice, but he also held that the plaintiff was entitled to commissions on orders whenever received if they came from customers whom he had introduced to the defendant. He held that there had been a breach of the agreement because the defendant had repudiated his liability to pay commission in respect of repeat orders, and in discussing the measure of damages he says: "What has to be ascertained is the present value of the probability or possibility of the defendant receiving orders in the future from customers who were introduced by the plaintiff before the relations between him and the defendant were terminated." An inquiry we may observe of a somewhat difficult nature.

Reports and Notes of Cases.

Province of Alberta.

SUPREME COURT, APPELLATE DIVISION.

Harvey, C.J., Scott, Stuart, and Beck, JJ.] [37 D.L.R. 171.

Re Small Debts Recovery Act.

Constitutional law—As to judiciary—Appointive powers—Justices of Peace.

The Small Debts Recovery Act (Alta.), which confers a limited civil jurisdiction on Justices of the Peace, is within the legislative powers of a province, under sec. 92 (14) of the B.N.A. Act, as to its administration of justice, and is no encroachment upon the Dominion appointive powers as to the judiciary under sec. 96 of the B.N.A. Act.

See also *Polson Iron Works* v. *Munns* (Alta.), 24 D.L.R. 18 (annotated); *Colonial Investment* v. *Grady*, 24 D.L.R. 176, 8 A.L.R. 496; *Kelly* v. *Mathers*, 23 D.L.R. 225, 25 Man. L.R. 580; *Re Farmers Bank*, 28 D.L.R. 328, 35 O.L.R. 470.

H. H. Parlee, K.C., for the Act.
Frank Ford, K.C., contra.

ANNOTATION ON ABOVE CASE FROM 35 D.L.R.

The Alberta Act for expediting the decision of constitutional and other legal questions is as broad in its terms as our own Ontario Act, R.S.O. 1914, c. 85, authorizing the Lieutenant-Governor-in-Council to refer to the Supreme Court 'any matter which he thinks fit to refer'; and the Act referred in the principal case is, not an actual existing statute, but only a proposed Act. I merely mention this to save any future investigator wasting as much time as the writer of the present note wasted in hunting for the statute among the Alberta Acts. True, Harvey, C.J., says in his opening sentence that it is only "a proposed Act"; but sometimes the things one is most likely not to notice are those which lie immediately under one's nose.

It is a strange thing that although over fifty years have passed since the Confederation Act came into force, no authoritative and comprehensive interpretation of s. 96 which provides as follows:—

> 96. The Governor-General shall appoint the judges of the Superior, District, and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick,

has yet been given. The ambition of the present writer is to contribute

something towards that end. In the meanwhile the judgments which come the nearest to a comprehensive interpretation appear to be those of the principal case, and that of Weldon, J., in *Ganong* v. *Bayley* (1877), 1 P. & B. 324, which is referred to only very slightly in the above judgment of Harvey, C.J. None of these judgments, however, state the jurisdiction possessed at Confederation by the courts referred to in s. 96 as "District and County Courts;" and, with submission, an examination of the pre-Confederation statutes shews one or two errors of fact.

Weldon, J., in *Ganong* v. *Bayley*, says:—

> "At the time of the passing of the Confederation Act, there were Superior Courts in all the provinces which were embraced in the Confederacy. There were District Courts in Canada. In Lower Canada there were the districts of Gaspe, of Saguenay, and of Chicoutimi; there were the County Courts existing in Upper Canada, and (*sic*) subsequently were established in New Brunswick, Nova Scotia, and Prince Edward Island. It appears to me these were the courts that the Governor-General was to appoint the judges to, when established, or as vacancies may occur, and to provide for them salaries, allowances, and pensions. There were, also, at the time of the passing of the Confederation Act Commissioners' Courts for the summary trial of small causes in what is now the Province of Quebec, and there were Division Courts in Ontario. No reference is made to them in the said Act."

To expand this passage in the judgment of Weldon, J., may be said to be the principal object of this note. I shall not dwell on the subject of "Superior Courts." I dealt with that portion of the section to the best of my ability in an annotation to the case of *Polson Iron Works* v. *Munns* (1915), 24 D.L.R. 18. I may, however, supplement what is there said by a reference to *Colonial Investment and Loan Co.* v. *Grady* (1915), 24 D.L.R. 176, 8 A.L.R. 496; and *Re Public Utilities Act, City of Winnipeg* v. *Winnipeg Electric R.W. Co.* (1916), 30 D.L.R. 159, 26 Man. L.R. 584. Neither shall I labour the point taken by Sir John Thompson in his famous Report on the Quebec District Magistrates Act, 1888 (Hodg. Prov. Legis. 1867-1895, p. 358 *seq.*), that the words "Judges of the Superior, District and County Courts," include all classes of judges like those designated, and not merely the judges of the particular courts which at the time of the passage of the Federation Act happened to bear those names. The judgments in the principal case support this, if anything more than common sense need be appealed to; and reference may also be made to *In re Small Debts Act* (1896), 5 B.C. 246; and *Burk* v. *Tunstal*, 2 B.C.R. 12; *King* v. *King* (1904), 37 N.S. 294; and Prov. Legisl. 1901-3, p. 33.

My object in the present note is to deal with the meaning and effect of the words "District and County Courts in each province," in the section. Incidentally it will, I think, appear that Beck, J., has erred in supposing that there were County Courts in all the provinces when the Confederation Act was passed on March 29th, 1867; and also in supposing that there was, at that time, "neither in the Province of Quebec or in any other province, any court whose legal appellation was District Courts."

There were District Courts, and District Court Judges in Upper Canada which I shall deal with first. That there were County Courts in Upper

Canada is not disputed, and anyone who looks at the Canadian Almanac for 1867, which is in Osgoode Hall Library, can see their names and counties. And as to District Court Judges, C.S.U.C. 1859, c. 128, provides as follows:—

"92. The Governor may, from time to time, by proclamation under the great seal declare that from and after a certain day to be named therein, a certain part or certain parts or the whole of the unorganized tracts of country in this province bordering upon and adjacent to Lakes Superior and Huron, including the Islands in those Lakes which belong to this province, and also all other parts of Upper Canada which are not included within the limits of any County or Township, shall form a Provisional Judicial District, or Provisional Judicial Districts, and define the limits of such Provisional Judicial District or Districts . . .

94. The Governor may appoint in each such Provisional Judicial District a fit and proper person being a barrister of not less than five years standing at the Bar of Upper Canada *to be a judge therein*, and such judge shall have the same powers, duties, and emoluments, and be paid in the same manner as a County Judge in Upper Canada, and he shall hold his office during pleasure and shall reside within the limits of his Provisional Judicial District . . .

96. The laws now in force with respect to the holding of Courts of Quarter Sessions of the Peace, County Courts, and Division Courts in the several Counties in Upper Canada and to the composition, power *and jurisdiction* of such Courts respectively . . . shall extend and apply to such Provisional Judicial Districts, and such Districts shall be deemed and held to be Counties for all and every the purposes of such laws."

The jurisdiction of such Upper Canada District and County Court Judges on March 29th, 1867, the date of the passing of the British North America Act, 1867, is set out in C.S.U.C. (1859), c. 15, there being no amendment before Confederation. This Act provides as follows:—

"16. The said courts shall not have cognizance of any action:

1. Where the title to land is brought in question; or

2. In which the validity of any devise, bequest or limitation under any will or settlement is disputed; or

3. For any libel or slander; or

4. For criminal conversation or seduction; or

5. Of any action against a Justice of the Peace for any thing done by him in the execution of his office if he objects thereto.

17. Subject to the exceptions contained in the last preceding section, the County Courts shall have jurisdiction and hold plea:

1. In all personal actions where the debt or damages claimed do not exceed the sum of $200;

2. In all causes and suits relating to debt, covenant and contract, to $400, when the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant; and

3. To any amount on bail bonds given to a sheriff in any case in a County Court, whatever may be the penalty; and

4. On recognizances of bail taken in a County Court, whatever may be the amount recovered or for which the bail therein may be liable.

33. The County Courts in Upper Canada shall possess the like jurisdiction and authority in respect of the matters hereinbefore mentioned as was possessed by the Court of Chancery on May 23, 1853.

34. Any person seeking equitable relief may (personally or by attorney) enter a claim against any person from whom such relief is sought, with the Clerk of the County Court of the County within which such last mentioned person resides, in any of the following cases, that is to say:

1. A person entitled to and seeking an account of the dealings and transactions of a partnership dissolved or expired, the joint stock or capital not having been over $800;

2. A creditor upon the estate of any deceased person, such creditor seeking payment of his debt (not exceeding $200) out of the deceased's assets (not exceeding $800);

3. A legatee under the will of any deceased person, such legatee seeking payment or delivery of his legacy (not exceeding $200 in amount or value) out of such deceased person's personal assets (not exceeding $800);

4. A residuary legatee, or one of the residuary legatees of any such deceased person seeking an account of the residue and payment or appropriation of his share therein (the estate not exceeding $800);

5. An executor or administrator of any such deceased person seeking to have the personal estate (not exceeding $800) of such deceased person administered under the direction of the judge of the County Court for the County within which such executor or administrator resides;

6. A legal or equitable mortgagee whose mortgage has been created by some instrument in writing, or a judgment creditor having duly registered his judgment, or a person entitled to a lien or security for a debt seeking foreclosure or sale or otherwise to enforce his security, where the sum claimed as due does not exceed $200;

7. A person entitled to redeem any legal or equitable mortgage or any charge or lien and seeking to redeem the same, where the sum actually remaining due does not exceed $200;

8. Any person seeking equitable relief for, or by reason of any matter whatsoever, where the subject matter involved does not exceed the sum of $200;

35. Injunctions to restrain the committing of waste or trespass to property by unlawfully cutting, destroying or removing trees or timber, may be granted by the judge of any County Court, and such injunctions shall only remain in force for a period of one month, unless sooner dissolved on an application to the Court of Chancery; but the power to grant such injunction shall not authorize the prosecuting of the suit in the County Court, and the injunction may be extended and the suit further prosecuted to judgment or otherwise in the Superior Court in the like manner as if the same had originated in that court."

The existence of such District Court judges as above mentioned in Upper Canada would alone account for the word "District" in s. 96.

In Quebec, however, the term "District" was an alternative to the term "Circuit," although the latter was generally used. Thus C.S.L.C. 1861, c. 76, provides:—

"5. Lower Canada is and shall be divided into twenty Districts, in the manner set forth in the following schedule . . .

6. [Established certain new Districts.]

7. There shall be the same officers connected with the administration of justice in each of the new Districts as in the old Districts, subsisting immediately before the time when the said new Districts were constituted . . .

C. 79, s. 1. A Court of Record to be called the Circuit Court and having jurisdiction throughout Lower Canada shall continue to be holden every year in each of the Districts and Circuits in Lower Canada, by one of the judges of the Superior Court.

S. 2. The Circuit Court shall have cognizance of and shall hear, try and determine all civil suits or actions, as well those where the Crown may be a party as others (those purely of Admiralty jurisdiction excepted), wherein the sum of money or the value of the thing demanded does not exceed $200, and wherein no writ of *capias ad respondendum* is sued out.

C. 82, s. 29. Whenever any real property is situate partly in one District or Circuit, and partly in another, the plaintiff may bring any real, or mixed action in regard to such real property in either of the said Districts or Circuits at his option . . ."

But, as Sir John Thompson tells us in his report on the Quebec District Magistrates Act, 1888, "the Circuit Court was at the time of the Union, in one sense, a branch of the Superior Court. The powers and duties of Superior Court judges included the powers and duties of Circuit Court judges. When the Governor-General appointed a judge of the Superior Court under s. 96 of the British North America Act, the appointment carried with it an appointment as Circuit Court judge." See Legislative Power in Canada, pp. 145-6.

Therefore, strictly speaking, I, perhaps, need not have referred to the Quebec Circuit Court here, but the fact that "District" was an alternative name to "Circuit" helps to explain the use of the word "District" in s. 96.

As to New Brunswick, County Courts were not established there until the passing of 30 Vict. c. 10, on June 17, 1867. This is entitled, 'An Act to establish County Courts.' But as it was passed before July 1, 1867, when the Federation Act came into force by proclamation, and it may, possibly, be contended that s. 96 of the latter Act extends to judges appointed under it, I will deal also with it. It provides, as follows, as to the jurisdiction of the new County Courts:—

"7. The courts shall not have cognizance of any action:

1. Where the title to land is brought in question; or

2. In which the validity of any devise, bequest, or limitation is disputed except as hereinafter provided; or

3. For criminal conversation or seduction; or

4. For breach of promise of marriage; or

5. Of any action against a Justice of the Peace for any thing done by him in the execution of his office.

8. Subject to the exceptions in the last preceding section, the County Courts shall have jurisdiction and hold plea in all personal actions of debt, covenant, and assumpsit, when the debt or damages claimed do not exceed the sum of $200, and in all actions of tort when the damages do not exceed $100, and in action on bail bonds given to the sheriff in any case in a County Court whatever may be the penalty or amount sought to be recovered."

S. 25 adds jurisdiction in the case of over-holding tenants; and s. 35 a certain jurisdiction in criminal cases.

As to Nova Scotia; County Courts were not established till the Act, 37 Vict. c. 18, 'An Act to establish County Courts,' assented to May 7, 1874. I, therefore, am not called upon to deal with them here as they cannot, probably, affect the interpretation of s. 96, but it may be stated that the exceptions to their jurisdiction are the same as in the case of New Brunswick, while in actions *ex contractu*, the limit is $400, and in actions of tort the limit is $200.

Lastly, as to Prince Edward Island, there do not appear either on March 29, 1867, or on July 1, 1867, to have been any courts called "County Courts" or "District Courts," but 23 Vict. c. 16, passed on May 2, 1860, being "An Act relating to the recovery of small debts," empowered the Lieutenant-Governor-in-Council "to constitute and appoint within each of the Counties of this Island not more than seven courts for the recovery of small debts, and to appoint in each court *three judges or commissioners* to adjudicate in each court, each court to have jurisdiction only within the County in which it is held, except in the cases hereinafter mentioned; provided always, that if, by reason of sickness or other unavoidable cause, not more than two *commissioners* shall be present on any day appointed for the hearing of cases, in any of the said *Courts of Commissioners* . . ."

Throughout the Act these courts are called "Courts of Commissioners" (*e.g.*, secs. 6, 35, 47, 96, 98, 99), and the judges are spoken of as "Commissioners," or (s. 78) "Commissioners for the County."

Sec. 7 provides:—

"The said courts shall have jurisdiction in matters of debt and trover for the recovery of sums not exceeding £20 (exclusive of interest), but not in any action brought for the recovery of any sum arising upon any contract or case when the title to real estate or boundary lines must be adjudicated upon, nor to any sum won by means of any wages or gaming, nor to any penalty incurred by any Act of this Island, unless so directed by any such Act, nor to any debt whereof there has not been a contract, undertaking or promise to pay within six years before the commencement of the action."

Sec. 8 provides that:—

"No action or suit, except the same commences by *capias* as hereinafter mentioned, for any sum for rent due upon any lease or demise or agreement for a lease or demise of any lands, houses, tenements or hereditaments in this Island, whereof the area shall exceed one acre of land, whether in writing or by parol, or for rent due between landlord and tenant, in respect of the occupation of any such lands, houses, tenements, or heredita-

ments shall be commenced in any court to be constituted under this Act, unless the sum or amount demanded cannot in any way be made the subject of a distress . . ."

This Act was amended by an Act, 25 Vict. c.6., assented to on April 17, 1862, repealing certain sections of the original Act prohibiting the arrest or imprisonment of any person on *mesne* or final process unless the sum for which the person was arrested or imprisoned amounted to more than £10, and making some new provisions in that matter. In this Act the judges are spoken of as "Commissioners."

So in the subsequent P.E.I. Acts, 27 Vict., c. 16, passed May 2, 1864, 29 Vict., c. 15, passed May 11, 1866, and 30 Vict., c. 4, passed May 17, 1867, authorizing the establishment of additional Small Debts Courts at certain places, the judges are spoken of as "Commissioners," or "Judges or Commissioners," or, in a marginal note, as "Small Debt Commissioners."

Nowhere are these Prince Edward Island Judges spoken of as "District Judges" or "County Court judges," and, therefore, it seems safe to say that the jurisdiction exercised by them throws no light on s. 96; but that the jurisdiction which will bring a judge within what is meant by "Judges of District and County Courts," is to be measured by reference to that exercised by the County Court Judges and District Court Judges in Upper Canada at Confederation; and possibly by that exercised by County Court Judges in New Brunswick under the New Brunswick Act above referred to.

In conclusion, I may add that the power to appoint County and District Court Judges in s. 96 of the British North America Act appears to carry with it the power to remove, although s. 99 applies only to Superior Court Judges: *Re Squier* (1882), 46 U.C.R. 474. See also *Niagara Election case* (1878), 29 C.P. 280; an article on the constitution of Canada, 11 C.L.T. 145, *seq.*; Todd's Parl. Gov. in Brit. Col., 2nd ed., pp. 46-7, 827, *seq.*, who treats, also, of powers of removal still existing under Imp. 22 Geo. III., c. 75; and an article on the right to remove County Court Judges, 17 C.L.T. 445, R.S.C. 1906, c. 138, provides for the removal of County Court Judges by order of the Governor-General-in-Council in certain cases.

Toronto. A. H. F. LEFROY.

Province of Ontario

FIRST DIVISION COURT OF THE COUNTY OF WATERLOO.

MANUFACTURERS LIFE INSURANCE CO. v. WILSON.

Life insurance—Contract—Promissory note given for premium—Nonpayment—Whether policy thereby avoided.

READE, Co., J.:—This action was brought to recover the amount of a promissory note made by the defendant in part

payment of the first year's premium on an insurance effected by the defendant with the plaintiffs.

In this contract with the plaintiffs the defendant undertook to accept the policy when issued and to pay the first year's premium, and also agreed that the policy should not take effect until it had been delivered and the first premium paid, and in the event of such or any premium being settled in whole or in part by cheque or note which is not paid when due the company should not be liable if death occur thereafter. The policy was issued and delivered to the defendant, but the note was not paid as agreed, and endorsed upon the policy is a condition that if any note or other obligation given in payment of a premium or any part thereof be not paid when due the policy shall be utterly void, but the note, cheque or other obligation shall nevertheless be paid.

It was clearly a part of the original contract between the plaintiffs and defendant that the continuance of the plaintiffs' liability upon the policy beyond the maturity of the note given should depend upon payment of the note or premium, and it is equally clear that it was a mutual agreement by and between the parties that the first year's premium should in any case be paid. It may well be understood that the insurance company would not enter into a contract for insurance and take all the necessary preliminary trouble of effecting and insuring and paying in most cases a commission on same, except upon the agreement that at least the first premium should be paid, and the express proviso in the condition endorsed on the policy that the note given shall nevertheless be paid, although for default in payment the policy should be void, is only an acceptance by the company of the defendant's undertaking that the first premium should be paid by him, and does not constitute an additional or extra condition in favour of the company to which the defendant had been no party. As a condition precedent to the acceptance by the plaintiffs of the defendant's application for insurance he expressly offers and they agree that in any case the first premium shall be paid. There is no provision for apportioning the premium under any circumstance as to death or otherwise and I cannot find that the defendant has the privilege in such a case of cancelling his own contract in that respect and considering the policy void for that purpose, by his default he can render the policy void, but he cannot by so doing render void his express contract that if the company accept his application and deliver to him a policy such as he applies for he will at least accept the same so far and for so long as to pay the first premium thereon, and I cannot find any

failure of consideration on the part of the company in respect of anything that they agreed to do. They have complied with their contract and the defendant must comply with his.

The case of *Royal Victoria Life Ins. Co.* v. *Richards*, 31 O.R. 483, is quite distingusihable from this and other cases. In some of these the policy was never accepted, and in others the policy was received, but in this particular case it was acted on and in force for some time.

Book Reviews.

Trial of Sir Roger Casement. By GEORGE H. KNOTT, M.A. (Edin). of the Middle Temple, Barrister-at-law. Toronto: Canada Law Book Company, Limited.

This was a trial for high treason resulting in the conviction of the accused. It naturally excited considerable interest, the prisoner having occupied a good position in society, and having held office under the British Government. The story is so well known that it is unnecessary to refer to it. From a legal standpoint it is of interest so far as it interprets the old statute of 25 Edw. III. chap. 2, known as the Treason Act of 1351. Mr. Justice Darling who gave judgment on the appeal thus refers to it: "The statute says, 'Whereas divers opinions have been before this time in what case treason shall be said, and in what not, the King at the request of the Lords and of the Commons, hath made a declaration in the manner as hereafter followeth,' which is the statute of Edward III., and various treasons are defined and after the treason of levying war against the King in his Kingdom, there is defined because it is only, as has often been said, declaring common law, this particular treason." The words as translated and appropriate to this charge are "or be adherent to the King's enemies in his realm giving to them aid and comfort in the realm or elsewhere." It is the construction of those few words which gave rise to the argument addressed to the Court before whom the appellant was tried. The point raised by Mr. Sullivan, who appeared for the prisoner, was that the statute had neither created nor declared that it was an offence to be adherent to the King's enemies beyond the realm of the King and that the words meant that the giving of aid and comfort outside the realm did not constitute a treason which could be tried in this country, and that the only person who gave aid and comfort outside the realm was himself within the realm. The case was tried before the

Lord Chief Justice, Viscount Reading. On a motion to quash the indictment it was upheld and the defendant found guilty. The Court of Appeal upheld the verdict and dismissed the appeal, and the prisoner shortly afterwards suffered the extreme penalty of the law. He was ably defended by the eloquent counsel who was appointed for that purpose, and the trial was conducted with the fairness with which criminals are always treated in British courts.

The Law of Trade Marks and Designs in Canada. By RUSSEL S. SMART, B.A.,M.E., Toronto. Canada Law Book Co. Ltd. Cromarty Law Book Co., 1112 Chestnut St., Philadelphia. 1917.

This is in effect a continuation of the compendium of information contained in volume 3 of the Commercial Law Reports (annotated) published in 1904 by the Canada Law Book Co., edited by Mr. W. R. P. Parker. The present author has given us all the information contained in the volume referred to, together with a review of the cases affecting trade marks and designs up to the present time. At the end of the volume we have the Acts on the above subjects, the rules and forms, together with a classification of the British Act of 1905.

It will be seen, therefore, that the whole subject is covered, and it will be a great convenience to practitioners to have it all in one compact volume. Mr. Smart has done his work exceedingly well, as have also the publishers and printers. We are glad to see the use of large readable type as well as the convenient and logical arrangement of the salient features of the subjects under discussion.

Bench and Bar

APPOINTMENTS.

Hon. Wm. Pugsley, of the City of St. John, New Brunswick, K.C., to be Lieutenant-Governor in and over the Province of New Brunswick, vice his Honour Gilbert White Ganong, deceased (November 6th).

Hon. John Douglas Hazen, of the City of Ottawa, K.C., to be Chief Justice of the Appeal Division of the Supreme Court of New Brunswick and Judge of the Chancery Division of that Court (November 6).

Hon. John Douglas Hazen, Chief Justice of New Brunswick, to be Local Judge in Admiralty of the Exchequer Court for the Admiralty District of New Brunswick. (Nov. 9.)

Angus Lorne Bonnycastle of the City of Winnipeg, Manitoba, Barrister, to be Judge of the County Court of the Dauphin Judicial District in the said Province. (Nov. 13.)

War Notes.

Dreamers are still wasting time, paper and ink in discussing a "World Court" to settle international disputes and the when and how of a "lasting peace." But there will be no lasting peace until the millenium; and there will never be a World Court that will sit, tho' there will be some day soon a dictator who will arise to exercise a baneful bloody tyranny until he is dethroned by the One who shall "rule the nations with a rod of iron."

Flotsam and Jetsam.

The Problem of the Criminal Insane.

Every year, writes Dr. Paul E. Bowers in the November *Case and Comment*, society is unjustly sending to prison hundreds of insane and feebleminded persons who, in the course of their mental disturbances, have violated the penal laws. This culpable practice of punishing the mentally sick should, "in the course of justice," cease.

Society is being poorly protected when it sends insane and mentally defective individuals to penal institutions and then releases them from custody uncured, merely because their sentences have expired. Yet this irrational procedure is being continuously practised by our courts and boards of parole in all the States of the Union.

The Wisdom of Lawyers.

Judges and lawyers have contributed a liberal share to the stock of popular sayings.

It is Francis Bacon who speaks of matters that "come home to men's business and bosom," who lays down the axiom that "knowledge is power," and who utters that solemn warning to enamored benedicts, "He that hath a wife and children hath given hostage to fortune."

We have the high authority of Sir Edward Coke for declaring that "corporations have no souls," and that "a man's house is his castle."

The expression, "An accident of an accident," is borrowed from Lord Thurlow. "The greatest happiness of the greatest number" occurs in Bentham, but as an acknowledged translation from the jurist Becaria.

It is John Seldon who suggests that by throwing a straw into the air one may see the way of the wind.

—*Case and Comment.*

Expert Testimony.

One of the common faults of experts is the desire to use many technical words, and thus confuse court and jury. In a case mentioned by Gilbert Stewart in his work on "Legal Medicine," a surgeon was called to testify on a trial for assault. He stated that he found the injured man "suffering from a severe contusion of the integuments under the left orbit, with great extravasation of blood and ecchymosis in the surrounding cellular tissues, which were in a state of tumidity." Now, of course, after a jury listened to such a description, it would seem that the patient was about to die or that his condition was exceedingly dangerous, while, as a matter of fact, the eminent follower of Hippocrates was describing an ailment which we commonly call "a black eye."

Mr. Justice Low, one of the Judges of the King's Bench Division, England, to which he was appointed in 1915, died last month at what is called in England the "early age" of sixty-one. Though said not to be a very profound lawyer nor a very eloquent advocate, the late judge commended himself to the Bar by his force of character, thoroughness, shrewd common-sense and practical ability. His professional career commenced with his being a Solicitor, not going to the Bar until the age of four and thirty. His business experience doubtless added much to his usefulness as a judge.

The California Law Review in a recent issue gives reasons why the Code States of our neighbours to the south of us should adopt a Uniform Sales Act, and to that extent meet the convenience of the public. This reminds us of the necessity which exists in having a uniform system of laws and legal procedure for the Dominion of Canada. This should not be hampered by any tradition of the past or any mere matter of sentiment.

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